Supreme Court, U.S.
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NO. 06-33

IN THE

Supreme Court of the United States

PG&E CORPORATION, ET AL.,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. BILL LOCKYER, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, AND
CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "police or regulatory power" exception to removal in 28 U.S.C. § 1452 permits a state governmental unit to circumvent a federal bankruptcy court's exclusive jurisdiction over a cause of action that is property of a debtor's bankruptcy estate.

II. Whether the "police or regulatory power" exception in 28 U.S.C. § 1452 permits a state governmental unit to avoid removal and seek recovery of property of a bankruptcy estate when the highest court of the state has held, under comparable facts, that the governmental unit has no state-law standing to usurp such an action.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, Robert Glynn, Jr., Gordon Smith, David A. Coulter, Mary S. Metz, C. Lee Cox, Carl E. Reichardt, William S. Davila, Barry Lawson Williams, David M. Lawrence, M.D., and David R. Andrews appeared as defendants and appellants in the bankruptcy court, the district court, and the court of appeals, and are petitioners herein.

RULE 29.6 STATEMENT

Petitioner PG&E Corporation is a publicly-held company. It has no parent companies, and no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

1. Background 3

2. Procedural History 4

3. The Court of Appeals' Decision 6

REASONS FOR GRANTING THE WRIT 9

I. The Ninth Circuit's Decision Conflicts with Holdings of the Sixth, Seventh, and Eighth Circuits. 9

A. The Ninth Circuit's Decision Conflicts with the Sixth Circuit's Formulation of the Pecuniary Interest and Public Policy Tests. 10

1. The Sixth and Ninth Circuits Have Taken Conflicting Positions as to Whether the Pecuniary Interest and Public Policy Tests Are to Be Applied in the Disjunctive or the Conjunctive. 10

2. The Ninth Circuit's Formulation of the Public Policy Test Conflicts with that of the Sixth Circuit. 12

B. The Ninth Circuit's Decision also Conflicts with Rulings by the Seventh and Eighth Circuits. 17

II. This Case Presents an Important Question Regarding the Operation of the Federal Bankruptcy System. 19

III. The Ninth Circuit's Decision Conflicts with a Holding of the California Supreme Court. 23

A. The California Supreme Court Held the Attorney General Holds No Special Standing to Bring a Restitution Action that Otherwise Belongs to the Estate of an Insolvent Insurance Company. 24

B. The Ninth Circuit's Decision Is Inconsistent with the California Supreme Court's Ruling. 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Acands, Inc. v. Travelers Cas. & Sur. Co.,
435 F.3d 252 (3d Cir. 2006), *cert. denied*
--S.Ct.--, No. 05-1191, 2006 WL 690668
(May 22, 2006) 22

Brown v. Chesnut (In re Chesnut),
422 F.3d 298 (5th Cir. 2005) 22

Cash Currency Exchange, Inc. v. Shine
(In re Cash Currency Exchange, Inc.),
762 F.2d 542 (7th Cir. 1985), *cert. denied*
474 U.S. 904 (1985) 9, 18-19

Central Virginia Community College v. Katz,
126 S.Ct. 990 (2006) 3, 19, 21, 29

Chao v. Hospital Staffing Services, Inc.,
270 F.3d 374 (6th Cir. 2001) ..... *passim*

In re State of Missouri,
647 F.2d 768 (8th Cir. 1981), *cert. denied*,
454 U.S. 1162 (1982) 9, 17, 18

Korean Supply Co. v. Lockheed Martin Corp.,
63 P.3d 937 (Cal. 2003) 20

Kraus v. Trinity Mgmt Servs. Inc.,
999 P.2d 718 (Cal. 2000) 20

Midlantic Nat'l Bank v. N.J. Dep't of Env'l Prot.,
474 U.S. 494 (1986) 22

People v. Pac. Land Research Co.,
569 P.2d 125 (Cal. 1977) 15, 26

Reinkemeyer v. SAFECO Ins. Co. of America,
166 F.3d 982 (9th Cir. 1999) 24

Sonoda v. Cabrera,
189 F.3d 1047 (9th Cir. 1999) 24

State of California v. Altus Finance, S.A.,
116 P.3d 1175 (Cal. 2005) ..... *passim*

CONSTITUTIONAL PROVISIONS AND CODES:

U.S. Const. Art. I 12

11 U.S.C. § 101 3
11 U.S.C. § 1107(a) 28
11 U.S.C. § 362(b)(4) 2, 9, 10, 22
11 U.S.C. §§ 362(d)-(e) 23
11 U.S.C. § 362(f) 23
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1334(a) 3
28 U.S.C. § 1334(e) 2
28 U.S.C. § 1441 ..... 5, 6
28 U.S.C. § 1452 i
28 U.S.C. § 1452(a) ..... *passim*

1978 U.S.C.C.A.N. 5787 22
1978 U.S.C.C.A.N. 6436 ..... 8, 11, 18

Cal. Bus. & Prof. Code § 17200 ..... *passim*
Cal. Ins. Code § 1037(f) 25

MISCELLANEOUS:

3 COLLIER ON BANKRUPTCY ¶ 362.03
(15th ed. rev. 2006) 22-23

PETITION FOR A WRIT OF CERTIORARI

Petitioners PG&E Corporation, Robert Glynn, Jr., Gordon Smith, David A. Coulter, Mary S. Metz, C. Lee Cox, Carl E. Reichardt, William S. Davila, Barry Lawson Williams, David M. Lawrence, M.D., and David R. Andrews respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-25a) is published at 433 F.3d 1115 (9th Cir. 2006). The opinion of the district court is unpublished (Pet. App. 26a-57a), and the opinion of the bankruptcy court (Pet. App. 58a-85a) is published at 281 B.R. 1 (Bankr. N.D. Cal. 2002).

JURISDICTION

The Court of Appeals denied rehearing en banc on April 5, 2006. (Pet. 86a-87a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1452(a) provides in relevant part:

> A party may remove any claim or cause of action in a civil action other than . . . a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such

> district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1334(e) provides in relevant part:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
> (1) of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . .

11 U.S.C. § 362(b)(4) provides in relevant part:

> The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—
>
> . . . .
>
> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power . . . .

STATEMENT OF THE CASE

This case presents questions regarding the ability of a governmental unit, by invoking the "police or regulatory power" exception to removal under 28 U.S.C. § 1452(a) ("Section 1452(a)"), to prosecute a state-court claim for restitution that is property of a debtor's bankruptcy estate and thereby circumvent the exclusive federal jurisdiction over all property of a bankruptcy estate granted to

bankruptcy courts under 28 U.S.C. § 1334(a). The Ninth Circuit held that the California Attorney General (the "Attorney General") and the City and County of San Francisco ("CCSF") could proceed in state court to seek restitution of payments made by a chapter 11 debtor prior to its bankruptcy filing and thereby usurp the debtor's rights to that cause of action. The decision threatens a serious impairment of three time-honored principles critical to the bankruptcy process: the scope of the automatic stay under section 362(a) of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, (the "Bankruptcy Code"), the exclusive jurisdiction of federal courts over all property of a bankruptcy debtor's estate, and the equality of distribution among creditors of equal priority. The Court of Appeals' judgment is also inconsistent with the *in rem* nature of the bankruptcy system recognized by this Court in *Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006), which was issued after the panel decision in this case. The Ninth Circuit's judgment further conflicts with decisions of the U.S. Courts of Appeals for the Sixth, Seventh, and Eighth Circuits, and of the California Supreme Court. This Court should therefore grant plenary review. Alternatively, in light of *Katz*, this Court should grant certiorari, vacate the Ninth Circuit's judgment, and remand.

1. Background

Petitioner PG&E Corporation ("PG&E Corp.") is a holding company that is the corporate parent of the Pacific Gas and Electric Company (the "Utility"). The Utility is regulated by the California Public Utilities Commission (the "CPUC"), which approved the restructuring under which PG&E Corp. became the Utility's parent. The individual Petitioners are, or were at the time of cash transfers that are the subject of this litigation, officers and/or directors of PG&E Corp.

In the years following the transition to the holding company structure, the Utility paid dividends to and repurchased shares from PG&E Corp., payments that totaled over $4 billion between 1997 and 2000. Each of these cash transactions was disclosed to the CPUC in advance.[1] In addition, the Utility transferred cash to PG&E Corp. for the payment of the Utility's share of taxes determined by PG&E Corp. on a standalone basis as required by the CPUC.

Beginning in the summer of 2000, the market for electricity in California swung sharply out of control. Because of a number of factors, the wholesale price of electricity skyrocketed. At the same time, because of retail rate regulations, the Utility was unable to pass these costs on to its retail customers (generally referred to as "ratepayers"). Consequently, the Utility suffered severe financial distress, resulting in its filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code on April 6, 2001, in the United States Bankruptcy Court for the Northern District of California (the "Bankruptcy Court"). After a contentious process involving competing plans, the major parties to the chapter 11 case, including the CPUC, reached an agreement on a plan of reorganization for the Utility. On December 22, 2003, the Bankruptcy Court entered an order confirming that plan, which became effective on April 12, 2004.

2. Procedural History

On January 10, 2002, while the Utility's chapter 11 case was pending, the Attorney General filed suit against the Petitioners in California state court seeking restitution, civil penalties, injunctive relief, receivership, and other equitable and ancillary relief based on the Petitioners' alleged violations of California's unfair competition law, Cal. Bus.

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[1] The lawfulness of the payments by the Utility to PG&E Corp. is not at issue in this case.

& Prof. Code § 17200 ("Section 17200").[2] The Attorney General alleges that the Petitioners' failure to return the monies PG&E Corp. had received earlier to the Utility at a time when the Utility was under financial duress due to the energy crisis was a breach of conditions adopted by the CPUC when it approved the formation of PG&E Corp. as the Utility's parent. On these allegations, the Attorney General seeks restitution from the Petitioners of approximately $5 billion transferred by the Utility to PG&E Corp. before the Utility filed its bankruptcy petition. On February 11, 2002, CCSF filed an almost identical lawsuit against the Petitioners in another California state court.

Pursuant to Section 1452(a) and, alternatively, 28 U.S.C. § 1441, the Petitioners timely removed both lawsuits to the Bankruptcy Court on the grounds that the alleged restitution and other remedies sought by the Attorney General and CCSF were property of the Utility's bankruptcy estate. The Attorney General and CCSF moved to remand on the ground, *inter alia*, that the police power character of their claims prohibited removal under Section 1452(a). The Bankruptcy Court agreed with Respondents and remanded the restitution claims to state court on June 14, 2002. App. 81a.

On appeal, the District Court reversed the Bankruptcy Court's decision, finding, *inter alia*, that: (1) the restitution claims were property of the Utility's bankruptcy estate under section 541 of the Bankruptcy Code and were, therefore, within the exclusive jurisdiction of the Bankruptcy Court; and (2) the restitution claims were not brought under the "police or regulatory power" of the Attorney General or

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[2] Section 17200 provides: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code."

CCSF and were accordingly removable to federal court under Section 1452(a). App. 57a.

3. The Court of Appeals' Decision

A divided panel of the Ninth Circuit reversed the District Court's holding with respect to removal of the restitution claims. The majority held that the exception for civil actions "by a governmental unit to enforce such governmental unit's police or regulatory power" precluded removal under Section 1452(a).

The Court of Appeals conceded that, as a debtor, "the Utility had the right to bring a claim against [PG&E Corp.] pursuant to section 17200" and to recover precisely the same payments as the Attorney General and CCSF, App. 17a-18a, and that "all or part of a restitution award might be returned to the Utility or the bankruptcy estate . . . ." App. 20a. The court thus assumed, *arguendo*, that "a restitution award would constitute property of the bankruptcy estate." *Id.*

Nonetheless, the Ninth Circuit held that the "police or regulatory power" exception precluded removal of the restitution claims. The majority acknowledged that the "police or regulatory power" exception applies only to actions "to protect the public safety and welfare" rather than actions "to protect the government's pecuniary interest," App. 13a, but opined that the Section 17200 claims fell within the former category.

> The actions filed by the Attorney General and San Francisco were brought pursuant to California's Unfair Competition Law, Cal. Bus. & Prof. Code section 17200. The restitution claims in the actions do not relate primarily to the protection of the government's pecuniary interest in the

> debtor's property. If restitution is warranted, California and San Francisco will receive no pecuniary advantage; according to [PG&E Corp.], the money may flow directly to the debtor, and not to the state, county, or city governments.

App. 15a.

In addition, the majority held that the restitution claims qualified for the "police or regulatory power" exception because they vindicated a "public purpose." "Under the 'public purpose' test, the court determines whether the government seeks to 'effectuate public policy' or to adjudicate 'private rights.'" App. 16a (citation omitted).

> In this case, as in every case involving restitution, a successful result for the governmental entities may well result in money being paid to private parties, either indirectly, through the bankruptcy court, or through direct payments. However, the section 17200 restitution claims filed by the governmental entities in this case are fundamentally law enforcement actions designed to protect the public. As such, the restitution claims also satisfy the 'public policy test.

App. 17a. "The government's right to pursue a cause of action under section 17200 is separate from, and not derivative of, the Utility's right to assert an action as a debtor-in-possession. The government's right of action under section 17200 is not part of the bankruptcy estate under section 541." App. 19a (footnote omitted).

Judge Callahan *dissented in relevant part.* She explained that the "police or regulatory power" exception did not apply to the restitution claims because the public interest was fully vindicated by the other remedies sought by the Attorney General and CCSF. "[T]he public's interest in 'penalizing past unlawful conduct and deterring future wrongdoing' is directly addressed by appellants' claims for injunctive relief and civil penalties, which we all agree fall within the police or regulatory power exception." App. 22a. "[T]he restitution claims do not seek to 'effectuate public policy' . . . ." App. 24a. The "restitution claims have the primary purpose of protecting a pecuniary interest." *Id.* Indeed, "the majority's comment that if restitution is warranted 'California and San Francisco will receive no pecuniary advantage' certainly implies that the restitution claims assert 'private rights'" rather than public rights. *Id.*

Judge Callahan noted the comment of Rep. Don Edwards during the enactment of the Bankruptcy Code that "the [police or regulatory power] exception is to be given a narrow construction and is 'not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor, or property of the estate.'" App. 22a (quoting 124 Cong. Rec. H11089 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45.

The Petitioners filed a timely petition for rehearing and rehearing en banc, which was denied on April 5, 2006. App. 86a-87a.

REASONS FOR GRANTING THE WRIT

This case presents important questions regarding the administration of the federal bankruptcy system. Under the Ninth Circuit's decision, the "police or regulatory power" exception becomes a vehicle for state and local governmental units to frustrate the federal bankruptcy process on a routine basis. In addition, the Ninth Circuit's decision conflicts with holdings of the U.S. Courts of Appeals for the Sixth, Seventh, and Eighth Circuits, and of the California Supreme Court. This Court's review is amply warranted.

I. The Ninth Circuit's Decision Conflicts with Holdings of the Sixth, Seventh, and Eighth Circuits.

The Ninth Circuit's decision is at odds with the holdings of other Circuit Courts of Appeals regarding the scope of the "police or regulatory power" exception. Specifically, the Ninth Circuit's ruling is inconsistent with the Sixth Circuit in *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374 (6th Cir. 2001), as well as with the decisions of the Eighth Circuit in *In re State of Missouri*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982), and the Seventh Circuit in *Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 555 (7th Cir. 1985), *cert. denied* 474 U.S. 904 (1985).[3]

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[3] Although each of these cases involved the interpretation and application of the "police and regulatory power" exception in 11 U.S.C. § 362(b)(4) ("Section 362(b)(4)") rather than Section 1452(a), courts have repeatedly noted that the language in both statutes is virtually identical and should be interpreted in the same way. As the Ninth Circuit stated in its opinion in this case, "[t]he language of the police and regulatory power exception in the automatic stay context and in the removal context is virtually identical, and the purpose behind each exception is the same. *Koken v. Reliance Group Holdings, Inc (In re Reliance Group Holdings,*

A. The Ninth Circuit's Decision Conflicts with the Sixth Circuit's Formulation of the Pecuniary Interest and Public Policy Tests.

The Ninth Circuit's decision conflicts with the decision of the Sixth Circuit in *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374 (6th Cir. 2001), in two critical respects.

1. The Sixth and Ninth Circuits Have Taken Conflicting Positions as to Whether the Pecuniary Interest and Public Policy Tests Are to Be Applied in the Disjunctive or the Conjunctive.

In *Chao* the Sixth Circuit made clear that the pecuniary interest test and the public policy test must be applied in a conjunctive, rather than disjunctive, manner. That is, the Sixth Circuit held that *both* tests must be met for the government's action to fall within the "police and regulatory power" exception. 270 F.3d at 388-89.

In contrast, the Ninth Circuit held in this case that the two tests are to be applied in the disjunctive, stating that the governmental unit's action in question falls within the exception if *either* test is met. App. 16a, n.11. Thus, under the Ninth Circuit's approach, a governmental unit may pursue a claim on behalf of its own pecuniary interest or the pecuniary interest of the debtor, so long as it can establish

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Inc.), 273 B.R. 374, 385 (Bankr. E.D. Pa. 2002). 'Section 1452 and 11 U.S.C. § 362(b)(4) were designed specifically to work in tandem. Therefore, interpretation of these two provisions should be consonant.' *Id.*" App. 12a (citation omitted). Accordingly, cases construing the "police and regulatory power" exception in Section 362(b)(4) are directly applicable and binding in construing the "police or regulatory power" exception in Section 1452(a).

that the primary purpose is to "effectuate public policy." App. 16a. And conversely, so long as a governmental unit can establish it is *not* seeking to recover for its *own* pecuniary interest or the pecuniary interest of the debtor, it need not make any showing of a public policy purpose.

The Sixth Circuit's approach is far superior because only it accords both with the natural reading of the statute's text and with its purpose as revealed by the available legislative history. Representative Don Edwards, a member of the joint committee resolving differences between the House and Senate versions of the legislation that enacted the exception, explained that the exception

> is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 Cong. Rec. H11,089 (Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45. Effectuating that purpose manifestly requires that both tests be applied so as to ensure an excepted action has been brought "to protect the public health and safety and not to . . . protect a pecuniary interest in property of the debtor or property of the estate."

Accordingly, the Sixth Circuit's approach most accurately reflects both what Congress said and what Congress sought to do in creating the "police or regulatory power" exception. Indeed, even the Ninth Circuit acknowledged that its disjunctive interpretation was flawed:

> Our controlling precedent, as we have discussed, quite plainly states satisfying either the "pecuniary interest" *or* "public policy"

> test will suffice. That being said, "[v]iewing the tests as disjunctive perhaps does not always make sense, however." [citation omitted]. One can conceive of actions in which it would make more sense to analyze the tests as conjunctive in order to effect the Congressional purpose . . . . A conjunctive, rather than a disjunctive, analysis would be more consistent with [Rep. Edwards' statement]. This case may provide an example of why application of the "pecuniary interest" test in isolation may not provide the most satisfactory analysis of whether the exemption applies.

App. 16a, n.11. (emphasis added).

This circuit-to-circuit variation in the understanding and application of the two tests—a variation that is highly likely to yield conflicting results—should not be permitted to continue. In enacting the Bankruptcy Code under its constitutional authority to make "uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, Congress endeavored to prescribe uniform rules governing all courts. Certiorari is warranted to resolve the conflict between circuits on this question and thereby restore the uniformity contemplated by the Bankruptcy Clause.

2. The Ninth Circuit's Formulation of the Public Policy Test Conflicts with that of the Sixth Circuit.

The Ninth Circuit's formulation of the public policy test stands in sharp contrast to the standard applied by the Sixth Circuit in *Chao* in yet another respect. The Ninth Circuit looked merely at whether there was an avowed public policy purpose in the action brought. The Sixth Circuit, on

the other hand, held that a court is compelled to weigh the stated public policy sought to be enforced against the benefit conferred on private parties in determining the substance of the action for purposes of the police power exception. These disparate approaches result in very different outcomes.

The Sixth Circuit began its discussion of the public policy test with the observation that "[a]ll acts of Congress by definition declare national policy, and lawsuits to enforce those acts necessarily effectuate the public policy of the United States." 270 F.3d at 389. The court, however, recognized that

> the public policy test calls upon courts to analyze whether *a particular lawsuit* is undertaken by a governmental entity in order to effectuate public policy or, instead, to adjudicate private rights. This is true because, in fashioning § 362(b)(4), Congress did not except from the automatic stay all lawsuits undertaken by appropriate governmental authorities; it expressly limited the exception to suits by a governmental unit "to enforce such governmental unit's police and regulatory power." This court's pecuniary interest and public policy tests recognize this limitation and are designed to sort out cases in which the government is bringing suit in furtherance of *either* its own or certain private parties' interest in obtaining a pecuniary advantage over other creditors.

270 F.3d at 389 (citation omitted)(emphasis in the original).

In that sorting out process, the court considered where the substance of the action lies—whether in serving

the public interest or in adjudicating private rights. The Sixth Circuit stated:

> When the action incidentally serves public interests but more substantially adjudicates private rights, courts should regard the suit as outside the police power exception, particularly when a successful suit would result in a pecuniary advantage to certain private parties vis-a-vis other creditors of the estate, contrary to the Bankruptcy Code's priorities.

270 F.3d at 390.

The difference between the approaches of the Sixth and Ninth Circuits can be outcome determinative. In this case, the Ninth Circuit held that the restitution action vindicated "public policy." By comparison, in *Chao*, the Sixth Circuit held that a suit against a chapter 7 trustee brought in district court by the Secretary of Labor under the so-called federal "hot goods" statute did not meet the "public policy" test. The "hot goods" law prohibits the introduction into interstate commerce of goods created by labor practices in violation of fair labor laws. The Sixth Circuit found that the substance of the Secretary's action was not to "protect other workers in the economy" but was instead "merely a vehicle to enforce the private rights of the employees to the minimum portion of their wages Congress guaranteed." 270 F.3d at 393-94. Thus, because the Secretary's action failed the public policy test, the Sixth Circuit determined that it did not fall within the police power exception.

In comparison to the very detailed analysis conducted by the Sixth Circuit, the Ninth Circuit held that the public policy test requires no more than an impressionistic judgment about the general nature of the law under which an action is brought. The Ninth Circuit made the conclusory

assertion that "a civil action brought by a governmental entity under section 17200 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" App. 17a. (citing *People v. Pac. Land Research Co.*, 569 P.2d 125, 129 (Cal. 1977)). The Ninth Circuit did not examine the substance of the action and each individual remedy sought, or weigh them against the public policy invoked by the governmental unit.

The Sixth Circuit has squarely rejected the approach adopted by the Ninth Circuit. As the Sixth Circuit has opined, the fact that a statute may be intended generally to protect the public interest and not to benefit private parties—as indeed every statute consistent with due process must be—is no guarantee that it will be used uniformly for that purpose. The Sixth Circuit noted that "[t]he existence of the public policy test naturally presumes that some suits by governmental units, even though they would effectuate certain declared public policies, will nevertheless be regarded as largely in furtherance of private interests." 270 F.3d at 389.

The Sixth Circuit's decision in *Chao* makes clear that it is not enough to hold, as the Ninth Circuit effectively did, that the public policy test is satisfied so long as any one of several remedies available under the statute in question has a law enforcement purpose. Judge Callahan's dissent illuminates the difference between the Sixth and Ninth Circuits:

> The majority seeks to bolster its conclusion that the restitution claims pass the "pecuniary purpose" [*sic*] test by opining that the claims also satisfy the "public policy" test. The shifts in the majority's analysis, however, expose the flaws in its determination. The majority initially states that the district court "correctly analyzed the individual claims, not

> the § 17200 action as a whole." When addressing the "public policy" test, however, the majority instead relies on the California Supreme Court's statement that "a civil action brought by a governmental entity under § 17200 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" [citation omitted]. The majority then asserts that the "character of a § 17200 [proceeding] is not affected by the choice of restitution as a remedy." These shifts from evaluating individual claims, to looking at the action as a whole, and from analyzing the individual causes of action, to accepting broad remedies, is not only confusing, but results in a definition of the "public policy" test that eviscerates the "pecuniary purpose" [sic] test. It makes little sense to analyze the individual claims in a § 17200 action to determine whether they meet the "pecuniary purpose" [sic] test if the court is going to conclude that the *entire* § 17200 action automatically meets the "public purpose" [sic] test when one or more of the claims asserted in the action concern matters of safety or welfare.

App. 23a-24a. (emphasis in the original).

Because the Ninth Circuit failed to consider the substance of the restitution remedy sought by the Attorney General, it glossed over the obvious realities of the situation in this case. Any suggestion that the restitution claim is necessary to serve a public deterrent function ignores the availability of injunctive relief and civil penalties, which all parties acknowledge fall within the "police or regulatory power" exception. Further, the Attorney General and CCSF concede that any restitution recovery will not go to the State

of California. Instead, they clearly intend the recovery to go to private parties (primarily ratepayers), who thus stand to receive billions of dollars outside the distribution scheme of the Bankruptcy Code. This overwhelmingly *private* gain negates any conceivable assertion of "public policy" interests, as the Bankruptcy Code uses that phrase. Had the Ninth Circuit applied the Sixth Circuit's version of the "public purpose" test, it would have concluded that the requirements of the public purpose test cannot be met.

The conflict between the Ninth Circuit and the Sixth Circuit on this point is of more than academic concern. The current split in the circuits creates uncertainty and a lack of uniformity on a relatively common jurisdictional issue that deprives the bankruptcy laws of the "uniformity" compelled by the Constitution and intended by Congress. This conflict, which raises both jurisdictional and practical issues of great moment, merits this Court's plenary review.

B. The Ninth Circuit's Decision also Conflicts with Rulings by the Seventh and Eighth Circuits.

The Ninth Circuit held that the "police or regulatory power" exception would apply in this case even assuming, *arguendo*, that "a restitution award would constitute property of the bankruptcy estate." App. 20a. The Eighth Circuit has held precisely the opposite. In *In re State of Missouri*, 647 F.2d 768 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982), the Eighth Circuit held that "the term 'police or regulatory power' refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws

that directly conflict with the control of the res or property by the bankruptcy court." *Id.* at 776[4].

The Eighth Circuit case involved grain located in Missouri storage warehouses. Prior to the commencement of bankruptcy proceedings, the Missouri Department of Agriculture assumed control of the grain pursuant to a state statute empowering the State to operate and liquidate insolvent grain warehouses. The Eighth Circuit held that the state regulation did not fall within the "police or regulatory power" exception:

> We conclude that Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the *pecuniary interest* in the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

647 F.2d at 776 (emphasis added).

The Seventh Circuit has followed the same approach. *See Cash Currency Exchange, Inc. v. Shine (In re Cash Currency, Inc.)*, 762 F.2d 542, 555 (7th Cir. 1985) ("[T]he liquidation provisions of the Community Currency Exchange Act are designed to protect the rights of creditors. And, the liquidation procedures, by vesting control of the debtors' property in the receiver, 'directly conflict with the control of the property by the bankruptcy court.' We hold that the state

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[4] This holding is consistent with the statement of Rep. Don Edwards that the exception was not intended "to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor, or propert[illegible] of the estate." 124 Cong. Rec. H11089 (1978), *reprinted in* 1978 [illegible] C.C.A.N. 6436, 6444-45.

proceedings at issue here do not fall within the ambit of the section 362(b)(4) exception.") *cert. denied* 474 U.S. 904 (1985).

The Ninth Circuit's decision in this case cannot be reconciled with these holdings. The Ninth Circuit held that it was immaterial, for purposes of the "police or regulatory power" exception, whether the restitution claim was property of the estate within the federal court's exclusive jurisdiction. The Seventh and Eighth Circuits have come to the contrary conclusion. This conflict among the Circuit Courts of Appeal warrants this Court's plenary review.

II. This Case Presents an Important Question Regarding the Operation of the Federal Bankruptcy System.

In *Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006), this Court opined that "[c]ritical features of every bankruptcy proceeding are the exercise of *exclusive jurisdiction* over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Id.* at 996 (emphasis added). This Court explained that bankruptcy courts exercise "principally *in rem* jurisdiction." *Id.* at 1000.[5]

The Ninth Circuit's decision in this case flies in the face of the principles articulated in *Katz* and threatens to disrupt the administration of the federal bankruptcy system.

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[5] Indeed, this Court made clear that even nominally *in personam* actions can fall within the bankruptcy's court's *in rem* jurisdiction when they involve attempts to recover portions of a debtor's estate. *Id.* at 1001 ("A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.").

The Court of Appeals allowed the Attorney General and CCSF to usurp the right of the Utility, a debtor in possession under chapter 11 of the Bankruptcy Code, to control its claims for restitution against the Petitioners and permitted the Attorney General and CCSF to bring those claims in state court without reference to the Utility's chapter 11 case. Yet the Section 17200 claim for restitution is an attempt to recover property of the Utility's estate.[6] The Section 17200 action is premised on the allegation that the Petitioners violated the conditions adopted by the CPUC by failing to return to the Utility payments that had been made to PG&E Corp. by the Utility before the bankruptcy was filed. The Ninth Circuit acknowledged that the Utility could have brought a Section 17200 action of its own seeking precisely the same restitution as the Attorney General and CCSF. App. 17a-18a. Indeed, the Ninth Circuit was able to find the Section 17200 action unrelated to the "the government's pecuniary interest in the debtor's property" only by asserting that "the money may flow directly to the debtor, and not to the state, county, or city governments." App. 15a. The Ninth Circuit's decision therefore treats the very fact that an action may serve to restore the debtor's property rather than swelling the public fisc as proof that the "police power" is being exercised. This logic violates the basic principle that, under the Bankruptcy Code, all property of the debtor, including its causes of action, is property of the bankruptcy estate and subject to the exclusive jurisdiction of the bankruptcy court.

Moreover, the Ninth Circuit rejected a central thesis of the Bankruptcy Code—equality of distribution among creditors of equal priority. Although the Court of Appeals

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[6] Under California law, restitution under Section 17200 is limited to the return of property by the person who took it to the person from whom it was taken. *Kraus v. Trinity Mgmt Servs. Inc.*, 999 P.2d 718, 732 (Cal. 2000); *see also, Korean Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943-45 (Cal. 2003).

suggested that any restitution by the Petitioners under Section 17200 would be directed initially to the debtor Utility, it is clear that the Attorney General and CCSF, if successful, intend any recovery ultimately to flow in some fashion to the Utility's ratepayers. As a result, the Attorney General would deplete the bankruptcy estate and create a fund outside the supervision of the Bankruptcy Court that would be distributed without regard to the provisions of the Bankruptcy Code. In short, the Ninth Circuit endorsed a result that violates the Code's distribution scheme, which has otherwise been zealously protected by federal courts as central to the operation of the bankruptcy process.

Indeed, the Ninth Circuit's decision provides a blueprint for disruption of the federal bankruptcy process. Under the Court of Appeals' judgment, state and local governmental units may seek restitution under Section 17200 and similar remedies in a wide range of cases to re-adjust the plan of distribution effected by a federally-approved bankruptcy order. For example, notwithstanding this Court's decision in *Katz* that a federal bankruptcy court action to set aside an alleged preferential transfer does not offend principles of sovereign immunity, the Ninth Circuit's decision would permit a state or local governmental unit to pursue its own Section 17200 restitution action in state court even where the bankruptcy court had already held that no preferential transfer existed. Under the Ninth Circuit's approach, a state would be entitled to recover the disputed sums in a state-law action in state court, and then return the monies as "restitution" to whichever creditors the state selected. Plainly, such actions to recover property of the estate fall within the bankruptcy court's traditional *in rem* jurisdiction, and yet the Ninth Circuit has licensed state and local governmental units to pursue them under the guise of state-law "restitution" actions in state court. It is difficult to imagine a more direct threat to the federal bankruptcy system.

The Ninth Circuit's decision would authorize the routine circumvention of the automatic stay. Like Section 1452(a), the automatic stay provision contains a "police and regulatory power" exception. 11 U.S.C. § 362(b)(4). Indeed, the Ninth Circuit explicitly premised its construction of Section 1452(a) on the parallel language of Section 362(b)(4). App. 12a. Accordingly, the Ninth Circuit's interpretation of the "police or regulatory power" exception will also govern in the context of the automatic stay under Section 362(b)(4).

The Ninth Circuit's holding would thereby eviscerate the automatic stay. Under the Ninth Circuit's decision, a state or local governmental unit would have the ability to prosecute a restitution action—not simply against third parties but also *against the debtor itself*—even during the pendency of a federal bankruptcy proceeding. If such an action qualifies as a "police and regulatory" action, then it would not be blocked by the automatic stay—even though it would directly deplete the debtor's estate and prejudice other creditors. This represents a significant loophole in what this Court has described as "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Env'l Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, p. 54 (1978); H.R. Rep. No. 95-595, p. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840, 5963, 6296). Yet it is well settled that the automatic stay is to be applied broadly and that all exceptions to its scope are intended to be applied narrowly. *See, e.g., Acands, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006) ("The scope of the automatic stay is broad and covers all proceedings against a debtor") (citations omitted) *cert. denied* --S.Ct.--, No. 05-1191, 2006 WL 690668 (May 22, 2006); *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 303 (5th Cir. 2005) ("the automatic stay has broad application"); *see also* 3 COLLIER ON BANKRUPTCY

¶ 362.03 (15th ed. rev. 2006) (noting the stay's "extremely broad" scope).[7]

The Ninth Circuit's decision shrinks the scope of the automatic stay and opens the door to ongoing assaults on a basic tenet of the bankruptcy system. The Court of Appeals' judgment presents an important question of federal bankruptcy law that urgently requires this Court's review.

III. The Ninth Circuit's Decision Conflicts with a Holding of the California Supreme Court.

In deciding that removal of the Attorney General's Section 17200 action is prohibited by the "police or regulatory power" exception to Section 1452(a), the Ninth Circuit ignored the California Supreme Court's decision in *State of California v. Altus Finance, S.A.*, 116 P.3d 1175 (Cal. 2005). As a consequence, the Ninth Circuit has entered a decision in this case that allows the Attorney General to avoid removal of a restitution action under Section 1452(a) even though the California Supreme Court has held that, as a matter of state law, the Attorney General has no standing to assert a claim under Section 17200 under the circumstances comparable to those at issue here. The Ninth Circuit's holding that federal law does not permit the removal of a Section 17200 action by the Attorney General effectively accords the state official a greater power under federal

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[7] The automatic stay is flexible enough to accommodate legitimate governmental interests. If a governmental entity (or any party in interest) believes there is cause to remove or modify the stay in connection with an action that does not fall within the scope of the "police and regulatory power" exception, the statute provides a mechanism through which it may request a hearing in the bankruptcy court to present its case. 11 U.S.C. §§ 362(d)-(e). Additionally, the statute provides a mechanism through which the governmental entity can request immediate relief from the stay without a hearing if it believes that its interest in the property will suffer "irreparable damage." *Id.* § 362(f).

bankruptcy law than he possesses in California state courts. The Ninth Circuit's decision, therefore, not only conflicts with *Altus*, but also presents an important question of federal law: whether the "police or regulatory power" exception covers an action by a state official even where the highest court of the state has authoritatively held that the official has no standing to bring the action. Certiorari is warranted to address this conflict.

A. The California Supreme Court Held the Attorney General Holds No Special Standing to Bring a Restitution Action that Otherwise Belongs to the Estate of an Insolvent Insurance Company.

The *Altus* case resulted from the certification of two questions from the Ninth Circuit to the California Supreme Court, both arising out of litigation brought by the Attorney General of California.[8] The first of these two questions—whether the Attorney General may pursue civil remedies for restitution under Section 17200 relating to assets of a insolvent insurance company for which the Insurance Commissioner is acting as conservator or liquidator or must that right give way to the Commissioner's exclusive statutory authority to bring such an action—is directly related to the federal question decided by the Ninth Circuit in this case.

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[8] Answers by a state's highest court to a federal court's certified questions are binding as precedent in that Circuit. *See Sonoda v. Cabrera*, 189 F.3d 1047, 1051 n.2 (9th Cir. 1999) ("answer to a certified question is binding"); *Reinkemeyer v. SAFECO Ins. Co. of America*, 166 F.3d 982, 984 (9th Cir. 1999) ("We are bound by the answers of state supreme courts to certified questions just as we are bound by state supreme court interpretations of state law in other contexts.").

Under the California Insurance Code, the Insurance Commissioner is appointed trustee of an insolvent insurance company and is granted the exclusive right to "prosecute and defend any and all suits and other legal proceedings" relating to property of the insolvent company. Cal. Ins. Code § 1037(f). The Commissioner for the insurance company in the *Altus* case had asserted claims against certain third parties under, *inter alia*, Section 17200, seeking to recover property taken from the insolvent insurance company. The Attorney General also asserted claims against the same third parties, including claims for restitution, civil penalties, and injunctive relief under Section 17200, claiming that his right to prosecute the claims as a matter of law enforcement took precedence over the rights of the Commissioner.

The California Supreme Court held that the Attorney General lacked standing to bring a restitution claim. The court held that the claim for restitution was a claim to recover property lost by the insolvent insurance company. "There can be little doubt that if, for example, a policyholder attempted a common law action seeking restitution as a remedy to restore property lost by an insolvent insurance company, such action would be precluded" by the statute. *Id.* at 1188. "It is difficult to see how the situation would be different if it were the Attorney General, rather than a policyholder, bringing a [Section 17200] action for restitution." *Id.*

In reaching this conclusion, the court acknowledged the Attorney General as the state's chief law enforcement officer and recognized that a restitution action "may have a collateral law enforcement effect, punishing the wrongdoer against whom restitution is sought." *Id.* However, the court held that the Attorney General "seeks to perform an action that is quintessentially within the scope of the Commissioner's power as conservator and trustee of the insolvent company. . . . [W]e conclude that the Attorney General may not pursue that remedy." *Id.*

As in this case, the Attorney General in *Altus* cited the California Supreme Court's earlier ruling in *People v. Pacific Land Research Co.*, 569 P.2d 125 (Cal. 1977), for the proposition that "[a]n action filed by the People seeking injunctive relief and civil penalties [under Section 17200] is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Id.* at 125. While the court acknowledged that general principle, it found

> it is not significant in the present context. Although the action by the Attorney General for restitution may be ancillary to the "primary remedies" tied directly to law enforcement actions, the Attorney General cannot, when the Commissioner acts as conservator of an insolvent insurance company, pursue such remedies without trespassing on the Commissioner's role.

116 P.2d at 1189. Thus, the California Supreme Court firmly rejected the argument that the Attorney General enjoys a special status or standing in bringing a claim for restitution under Section 17200.

B. The Ninth Circuit's Decision Is Inconsistent with the California Supreme Court's Ruling.

The Ninth Circuit's decision in this case conflicts with the California Supreme Court's judgment in *Altus*. The California Supreme Court held that the Attorney General lacked standing to bring a restitution claim, that his authority was no greater than that of the trustee for an insolvent insurance company, and that the Attorney General does not enjoy any special right to prosecute a claim for restitution

under Section 17200. In contrast, the Ninth Circuit asserted that "[t]he government's right to pursue a cause of action under section 17200 is separate from, and not derivative of, the Utility's right to assert an action as a debtor-in-possession." App. 19a.

If the *Altus* reasoning were applied to this case, the Attorney General and CCSF would also be precluded from pursuing their restitution remedy under Section 17200 against the Petitioners. The district court, in fact, did apply that same analysis, as did the dissent to the Ninth Circuit's opinion. The Ninth Circuit majority, however, dismissed the plain meaning of the California Supreme Court's ruling in a conclusory footnote:

> The California Supreme Court's recent decision in [*Altus*] does not alter this conclusion. . . . The obligations, rights, and responsibilities of the California Insurance Commissioner and a federal bankruptcy debtor-in-possession differ. Further, in examining the specific action at hand, the court also concluded that the primary purpose of the Attorney General's suit was to benefit defined individuals and entities, the protection of which was already committed to the Insurance Commissioner, rather than to benefit the general public interest.

App. 19a, n12.

The Ninth's Circuit's cavalier reference to differences between "[t]he obligations, rights, and responsibilities of the California Insurance Commissioner and a federal bankruptcy debtor-in-possession" is particularly ironic because, in *Altus*, the California Supreme Court emphasized the *similarities* between the

Commissioner and a trustee in bankruptcy[9]. That court noted that the Commissioner's powers were part of a statutory scheme that "is the functional equivalent of federal bankruptcy laws." 116 P.3d at 1181. It also noted that the portion of the Insurance Code in question had the same purpose as federal bankruptcy law—"to ensure the equitable distribution of an insolvent debtor's property among creditors." *Id.* at 1187.

The Ninth Circuit's attempt to distinguish the California Supreme Court's ruling in *Altus* on the basis of differences between the role of the Insurance Commissioner and that of debtors in possession is thus belied by the words of the California Supreme Court. The California Supreme Court plainly saw the two positions as completely analogous on the relevant point.[10]

The Ninth Circuit thus ignored the clear import of the California Supreme Court's ruling in *Altus* and decided a critical issue under federal bankruptcy statutes in a manner that affords the Attorney General and CCSF greater authority

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[9] The rights and duties of a debtor in possession and a trustee are the same under the Bankruptcy Code. See 11 U.S.C. § 1107(a) (a debtor in possession has "all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a [bankruptcy] case . . . .")

[10] There is no meaningful distinction in the Ninth Circuit's comment that the *Altus* court found the primary purpose of the Attorney General's action in that case was "to benefit defined individuals and entities, the protection of which was already committed to the Insurance Commissioner, rather than to benefit the general public interest." App. 19a, n.12. Although the Ninth Circuit neatly sidestepped the point as to which parties are to receive the economic benefit of the restitution recovery, if any, it is obvious (and stated in their complaints and briefs) that the Attorney General and CCSF intend the recovery to benefit the Utility's ratepayers. Those ratepayers are just as much "defined individuals and entities" as were the creditors and policyholders of the failed insurance company in *Altus*, and their protection—whether as creditors or some other party in interest in the chapter 11 case—was already committed under the Bankruptcy Code to the Bankruptcy Court and the Utility, as debtor in possession.

and standing to bring a restitution claim under Section 17200 than those granted under California law. In so doing, the Ninth Circuit has created a direct conflict with that ruling.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should GVR in light of *Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006).

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

APPENDIX B

Opinion of the United States District Court for the Northern District of California 26a

APPENDIX C

Order of the United States Bankruptcy Court Northern District of California 58a

APPENDIX D

Order Denying Rehearing of the United States Court of Appeals for the Ninth Circuit 86a

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY & COUNTY OF SAN FRANCISCO, *Plaintiff-Appellant,*	No. 03-16976
v.	D.C. No.
PG&E CORPORATION, *Defendant-Appellee.*	CV-02-03668-VRW
PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER, Attorney General State of California, *Plaintiff-Appellant,*	No. 03-17051 D.C. Nos. CV-02-04330-VRW CV-02-03668-VRW
v.	CV-02-04071-VRW
PG&E CORPORATION, *Defendant-Appellee.*	OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding
Argued and Submitted
February 18, 2005-San Francisco, California
Filed January 10, 2006
Before: Sidney R. Thomas, Richard A. Paez, and
Consuelo M. Callahan, Circuit Judges.
Opinion by Judge Thomas;
Partial Dissent by Judge Callahan

COUNSEL

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OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether a lawsuit filed by governmental entities seeking restitution to third parties pursuant to the California Unfair Practices Act constitutes a police and regulatory power action that cannot be removed to bankruptcy court. Under the circumstances presented here, we conclude that it does, and reverse the judgment of the district court.

I

The present controversy stems from the bankruptcy reorganization filed by Pacific Gas & Electric Company ("the Utility" or "the Debtor"). The Utility provides gas and electric services to more than four million customers in northern and central California, subject to the regulation of the California Public Utilities Commission ("CPUC") and the Federal Energy Regulatory Commission ("FERC"). In general, the CPUC has jurisdiction to set the rates, terms and conditions of service for the Utility's electricity distribution, natural gas distribution and natural gas transportation and storage services in California. The CPUC is also responsible

for setting service levels and certain operating practices and for reviewing the Utility's capital and operating costs. FERC has jurisdiction to set the rates, terms and conditions of service for the Utility's electricity transmission operations and wholesale electricity sales.

The Utility is a wholly owned subsidiary of PG&E Corporation ("the Corporation"), an energy-based holding company incorporated in 1995 that conducts business principally through the Utility. With one exception, during the period relevant to this appeal, the members of the board of directors of the Utility and the Corporation were the same.

In April 2001, the Utility filed a voluntary petition for bankruptcy under the reorganization provisions of Chapter 11 of the Bankruptcy Code. In early 2002, the California Attorney General and the City and County of San Francisco ("San Francisco") filed separate law enforcement actions in San Francisco Superior Court against the Corporation, alleging that it illegally transferred billions of ratepayer generated dollars from the Utility to itself in violation of section 17200 of the California Business and Professions Code.[1] The Attorney General and San Francisco sought injunctive relief, civil penalties, and restitution as remedies for the parent Corporation's and its directors' unlawful actions. As summarized by the bankruptcy court, the Attorney General alleged that:

> Corporation has engaged in a series of events amounting to unlawful, unfair and fraudulent business acts or practices including (1) agreeing to the so-called First Priority

[1] Cal. Bus. & Prof. Code §17200 states: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Condition[2] while never intending to abide by it and other conditions; (2) subordinating the interests of Debtor and Debtor's ratepayers to Corporation's own interest; (3) failing to disclose to the California Public Utilities Commission (the "CPUC") its true intentions during the so-called Holding Company Proceedings;[3] (4) transferring ratepayer-funded assets from Debtor to Corporation for the benefit of Corporation and its affiliates, even while Debtor was experiencing financial distress, and without intent to infuse capital into Debtor when it needed capital to operate, in violation of the First Priority Condition and other conditions; (5) appropriating over $4 billion from revenues that Debtor had received from high frozen rates paid by ratepayers; (6) implementing "ring-fencing" transactions to protect the assets of other affiliates of Corporation from bankruptcy or credit down-grading, insuring that it would be impossible for Debtor to access such excess and impairing Corporation's ability to provide cash to Debtor, again in violation of the First Priority Condition.

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[2] The Attorney General alleged that "in order to obtain CPUC's approval of Debtor's application to reorganize into a holding company structure ... , Corporation and its directors agreed that they would give 'first priority' to the capital needs of the Debtor as determined to be necessary and prudent to meet its obligations to serve or operate Debtor in a prudent and efficient manner." *In re Pac. Gas & Elec. Co.*, 281 B.R. at 4 n.4.

[3] "On October 20, 1995, Debtor filed an application with the CPUC for approval to reorganize under a holding company structure. It proposed to implement the restructuring through a reverse triangular merger. As a result of merger, Debtor would become the wholly owned subsidiary of Corporation." *In re Pac. Gas & Elec. Co.*, 281 B.R. at 4 n.5.

In re Pac. Gas & Elec. Co., 281 B.R. 1, 4 (Bankr. N.D. Cal. 2002).

The Attorney General sought the following relief for the alleged conduct: (1) an injunction against the Corporation and its officers barring them from engaging in further violations of 17200; (2) the appointment of a receiver; (3) an order directing the Corporation and its officers to pay restitution; and (4) an order assessing civil penalties of not less than $500 million and the cost of suit. The Attorney General did not identify to whom restitution, if found necessary, should be paid. Id. The Corporation removed the Attorney General's action to bankruptcy court. The Attorney General moved to remand the action to state court.

In February 2002, San Francisco filed a complaint in the Superior Court of the State of California for the County of San Francisco alleging that from 1997 through 2000, the Utility and the Corporation unlawfully conspired to transfer $4.6 billion from the Utility to the Corporation. This lawsuit mirrored the Attorney General's action, alleging violations of Cal. Bus. & Prof. Code § 17200 et seq. The Corporation removed San Francisco's action to the bankruptcy court, and San Francisco moved to remand the action.

In June 2002, the bankruptcy court issued a decision in which it determined that: (1) the Eleventh Amendment did not bar removal of the Attorney General's and San Francisco's § 17200 actions, *In re Pac. Gas & Elec. Co.*, 281 B.R. at 6-7; and (2) the Attorney General's and San Francisco's § 17200 actions were exempt from removal under 28 U.S.C. § 1452(a) because they were "police or regulatory power" actions, *id.* at 10-13.

All parties appealed portions of the bankruptcy court's decision to the United States District Court for the Northern District of California. The Attorney General and San Francisco appealed the bankruptcy court's holding that

the Eleventh Amendment did not bar removal of their § 17200 actions. The Corporation appealed the bankruptcy court's decision that 28 U.S.C. § 1452(a) bars removal of the § 17200 actions.

The district court affirmed in part and reversed in part the bankruptcy court. The district court affirmed the bankruptcy court's holding that the Eleventh Amendment did not bar removal of the § 17200 actions. The district court also concluded that: (1) the bankruptcy court correctly remanded the § 17200 actions as to civil penalties and injunctive relief because the "police or regulatory power" exception of 28 U.S.C. § 1452(a) barred removal; (2) the bankruptcy court erroneously remanded the restitution remedy sought in the § 17200 actions because it did not fall within 28 U.S.C. § 1452(a)'s "police or regulatory power" exception; and (3) the restitutionary claims are the property of the Utility's estate. Therefore, the district court stayed the restitution award claim and reversed the bankruptcy court's order remanding the restitution award claim.

The Attorney General and San Francisco timely appealed. On April 12, 2004, after these appeals were filed, the Utility emerged from bankruptcy. As part of its confirmed plan of reorganization, the Utility released any and all claims it had against the Corporation and its officers and directors.

II

Before proceeding to the merits of this case, we must first dispose of a few predicate jurisdictional issues.

A

[1] We have appellate jurisdiction to review the remand order. Generally, a district court's denial of a motion to remand a case to state court is not a final decision on the merits that we may review on direct appeal under 28

U.S.C. § 1291. *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1274-75 (9th Cir. 1990). However, the general rule does not apply if a district court's order denying a motion to remand effectively ends the litigation or "effectively sends a party out of court." *Ramirez v. Fox Television Station Inc.*, 998 F.2d 743, 746 (9th Cir. 1993) (quoting *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986)). Here, the district court's action effectively terminated the Attorney General's and San Francisco's restitution claim. Therefore, the district court's order was a final decision appealable under 28 U.S.C. § 1291, and we have appellate jurisdiction to review the order denying remand. *Ramirez*, 998 F.2d at 747.[4]

B

[2] Our review of the district court's order is not precluded by 28 U.S.C. § 1452(b), which bars appellate review of a district court's order remanding a properly removed cause of action if the remand decision is based on equitable factors.[5] Section 1452(b) does not deprive appellate courts of jurisdiction to review whether the action was properly removed in the first instance. *See Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.)*, 124 F.3d 619, 625 (9th Cir. 1997) ("The language of § 1452(b)

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[4] Given this conclusion, it is unnecessary for us to decide whether or not we also have pendant appellate jurisdiction, as urged by the Attorney General and San Francisco.

[5] Section 1452(b) provides as follows:

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

expressly precludes appellate review of a district court's refusal to remand a properly removed action on equitable grounds. However, the plain language of § 1452(b) *presumes* that removal under § 1452(a) was proper.").

The central issue in this case is whether removal of the actions filed by the Attorney General and San Francisco was precluded because the claims were part of "a civil action by a governmental unit to enforce such governmental unit's police or regulatory power," and not subject to removal under 28 U.S.C. section 1452(a). This is a question of subject matter jurisdiction that does not implicate the jurisdictional limitations of section 1452(b).

C

[3] Our appellate jurisdiction is also not precluded by the statutory bar, pursuant to 28 U.S.C. section 1447(d), of review of district court decisions to remand for lack of subject matter jurisdiction.[6] There is no question, and

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[6] 28 U.S.C. § 1447 provides in relevant part:

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

neither party disputes, that § 1447(d) only applies to cases remanded pursuant to § 1447(c), where there is a defect in the removal procedure or "the district court lacks subject matter jurisdiction."

Rather, the Corporation urges that section 1447(d) should be construed as modifying the standards set forth in section 1452(b) to bar appeals of remand orders, and orders to not remand, which are founded on subject matter jurisdiction. For this proposition, the Corporation relies on *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). However, *Things Remembered* did not hold that section 1447(d) modified section 1452(b). Rather, the Court explained in *Things Remembered* that both statutes govern removals and remands in bankruptcy cases: there is nothing in section 1447(d) that should be read to imply that it does not apply to bankruptcy, and section 1452(b) should not be read to prevent section 1447(d) from applying to bankruptcy. *See id.* at 129.

Section 1447(d) does not "preclude appellate review of a district court decision not to remand when the district court erroneously finds subject matter jurisdiction." *Bissonnet Invs. LLC v. Quinlan (In re Bissonnet Invs. LLC)*, 320 F.3d 520, 525 (5th Cir. 2003). The policy reasons for precluding appellate review of an order to remand based on the lack of jurisdiction, whether correct or not, do not similarly apply to the opposite situation where a district court retains jurisdiction based on the belief, whether correct or not, that federal courts have exclusive jurisdiction over a claim or cause of action. The strong congressional policy against appellate review of remand orders is this:

> Except in the highly unlikely event that a district court is so unsure of itself that it stays its decision to remand, the entry of a remand order ends the proceeding in the federal court and the state (or other) court proceeding gets under way. If months or years later a federal

> Court of Appeals decides that the remand was improper, matters are thrown into confusion and the effort expended by the parties on the state court proceeding (along with a good deal of state judicial resources) is in jeopardy. And if the state case has proceeded to judgment, the subsequent re-removal is for naught as the parties are bound by *res judicata*.

Sykes v. Texas Air Corp., 834 F.2d 488, 490 (5th Cir. 1987) (footnote omitted).

This policy is inapplicable to appellate review of district court decisions not to remand a claim or cause of action to state court. Indeed, the strong policy of maintaining the limited jurisdiction of federal courts militates towards allowing appellate review of a district court decision not to remand, particularly when considering the possibility that the district court made the decision based on the erroneous finding that it possessed subject matter jurisdiction, a finding that can be challenged at any stage of litigation. *Cf. Things Remembered*, 516 U.S. at 132 n.1 (Ginsburg, J., concurring) ("An interlocutory decision 'to not remand,' therefore, although not per se reviewable, would leave open for eventual appellate consideration--also and earlier for district court reconsideration--any question of the court's subject-matter jurisdiction."); *Sykes*, 834 F.2d at 492 n.16 ("When the district court decides to *retain* a case in the face of arguments that it lacks jurisdiction, the decision itself is technically unreviewable; but of course the appellate court reviewing any other aspect of the case must remand for dismissal if the refusal to remand was wrong, *i.e.*, if there is no federal jurisdiction over the case."). Furthermore, the fact that section 1447(d) only applies to orders to remand, not orders denying a motion to remand, adds support to the argument that, read together, sections 1447(d) and 1452(b),

do not bar appellate review of a decision to not remand where a lack of federal subject matter jurisdiction is alleged.

There is nothing in section 1447(d) that precludes appellate jurisdiction in this case.[7]

D

[4] Both the bankruptcy court and the district court correctly concluded that the Eleventh Amendment did not preclude the exercise of federal court jurisdiction, as the Attorney General argues. The Attorney General contends that sovereign immunity barred the removal of his action to federal court. However, the Attorney General was the plaintiff in the original section 17200 action brought in state court. Therefore, removal of that action was not prohibited by the Eleventh Amendment. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 848 (9th Cir. 2004) ("[W]e hold that a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to federal court of competent jurisdiction.").

III

[5] The central question in this case is whether the section 17200 state lawsuits filed by the Attorney General and San Francisco constitute police or regulatory power

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[7] Given our resolution of this issue, it is not necessary to discuss the counter-argument raised by the Attorney General and San Francisco that the *Clorox/Pelleport* doctrine would provide appellate jurisdiction if section 1447(d) applied to preclude it. *See Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1118 (9th Cir. 2002) (noting that because "deciding a substantive legal question [was] necessary to determine whether subject matter jurisdiction existed, the CloroxlPelleport doctrine does not apply."). *See generally Clorox Co. v. United States Dist. Ct.*, 779 F.2d 517, 520 (9th Cir. 1985) and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

actions that cannot be removed to bankruptcy court under 28 U.S.C. section 1452(a). That section provides:

> A party may remove any claim or cause of action in a civil action *other than* a proceeding before the United States Tax Court *or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power*, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a) (emphasis added).

A

In bankruptcy cases, we have construed the phrase "police or regulatory power" in the context of the automatic stay exception contained in 11 U.S.C. section 362(b)(4).[8] The language of the police and regulatory power exceptions in the automatic stay context and in the removal context is virtually identical, and the purpose behind each exception is the same. *Koken v. Reliance Group Holdings, Inc. (In re Reliance Group Holdings, Inc.)*, 273 B.R. 374, 385 (Bankr. E.D. Pa. 2002). "Section 1452 and 11 U.S.C. § 362(b)(4) were designed specifically to work in tandem. Therefore, interpretation of these two provisions should be consonant." Id. (citation omitted); *see also* 1 Collier on Bankruptcy (15th ed.) § 3.07[3] ("It would seem, therefore, that the congressional intent was to make those types of civil actions

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[8] Section 362(b)(4) excepts from the automatic stay actions and proceedings by a governmental unit "to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power."

that are not subject to removal correspond to civil actions that are excepted from the automatic stay.").

In the automatic stay context, we generally have construed the phrase "police or regulatory power" to "refer to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court." *Hillis Motors, Inc. v. Haw. Auto Dealer's Ass'n*, 997 F.2d 581, 591 (9th Cir. 1993).

[6] We have applied two alternative tests to determine whether the actions of a governmental unit are in exercise of its police and regulatory power as defined in 11 U.S.C. section 362(b)(4): the "pecuniary purpose" and the "public policy" test. *Universal Life Church v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1297 (9th Cir. 1997)[9] Satisfaction of either test will suffice to exempt the action from the reach of the automatic stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108 (9th Cir. 2005).

If the action primarily seeks to protect the government's pecuniary interest, the automatic stay applies. If the suit primarily seeks to protect the public safety and welfare, the automatic stay does not apply. *Universal Life*, 128 F.3d at 1297; *see also Mirant*, 398 F.3d at 1109 ("If the suit seeks to protect the government's pecuniary interest, the § 362(b)(4) exception does not apply. On the other hand, if

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[9] "These tests derive from a statement made by Representative Don Edwards, a member of the joint committee resolving differences between the House and Senate versions, who stated that the exception 'is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor, or property of the estate.'" *Fed. Trade Comm'n v. first Alliance Mortgage Co. (In re First Alliance Mortgage Co.)*, 264 B.R. 634, 646 (Bankr. C.D.Cal. 2001) (quoting 124 Cong. Rec. H11,089 *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45).

the suit seeks to protect public safety and welfare, the exception does apply.").

B

In applying the pecuniary purpose and public policy tests, the district court correctly analyzed the individual claims, not the section 17200 actions as a whole. *See NLRB v. Continental Hagen Corp.*, 932 F.2d, 828 834-35 (9th Cir. 1991) (considering award for backpay separately from cease and desist order, both sought for violation of 29 U.S.C. § 158); *In re Charter First Mortgage, Inc.*, 42 B.R. 380, 382 (Bankr. D. Or. 1984) ("[I]t is clear to this court that in applying the pecuniary purpose test, it must look to what specific acts the government wishes to carry out and determine if such execution would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate.").

If we considered only the action as a whole, the government could circumvent the reach of the automatic stay by including in one action claims that clearly were subject to the automatic stay with exempt claims. The same principle applies to the police or regulatory power exception contained in section 362(b)(4). Thus, contrary to the assertions of the Attorney General, we must analyze the claims separately, as did the district court.

C

On appeal, no party disputes that the Attorney General's and San Francisco's claims for injunctive relief and civil penalties fall within the police or regulatory exception to removal. The remaining question is whether the restitution claims satisfy the requirements to be exempt from removal. We conclude that they do.

[7] The lawsuits brought by the Attorney General and San Francisco clearly pass the "pecuniary interest" test. "The purpose of the 'pecuniary purpose' test is to prevent suits that would allow a governmental unit to obtain an advantage over creditors or potential creditors in the bankruptcy proceeding." *Mirant*, 398 F.3d at 1109. "Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of safety and welfare." *Universal Life*, 128 F.3d at 1297.[10]

The actions filed by the Attorney General and San Francisco were brought pursuant to California's Unfair Competition Law, Cal. Bus. & Prof. Code section 17200. The restitution claims in the actions do not relate primarily to the protection of the government's pecuniary interest in the debtor's property. If restitution is warranted, California and San Francisco will receive no pecuniary advantage; according to the Corporation, the money may flow directly to the debtor, and not to the state, county, or city governments.

[8] Restitution will benefit the public welfare by penalizing past unlawful conduct and deterring future wrongdoing. There is no showing that the restitution claims

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[10] In its opinion, the district court properly highlighted an anomaly in *Universal Life*. In another portion of the *Universal Life* opinion, the phrase "solely" is used rather than "primarily." However, as the district court correctly observed, the test identified in *Universal Life* is whether the government's action primarily relates to the protection of the government's pecuniary interest, and subsequent cases have adhered to that articulation. *See, e.g., Mirant*, 398 F.3d at 1109; *Berg v. Good Samaritan Hosp. (In re Berg)*, 230 F.3d 1165, 1167 (9th Cir. 2000). The incidental use of the word "solely" appears to be a transcription error in describing the holding of *Thomassen v. Div. of Med. Quality Assurance (In re Thomassen)*, 15 B.R. 907, 909 (9th Cir. BAP 1981).

primarily advance the governments' pecuniary interests. In these circumstances, the restitution claim fits comfortably within section 362(b)(4)'s "police or regulatory power."

2

[9] Given that the governmental entities have satisfied the pecuniary interest test, it is unnecessary for us to reach the question of whether the restitution claim also satisfies the "public policy" test. However, most of our cases have analyzed both tests, and there are sound analytical reasons for considering both tests in conjunction.[11]

"Under the 'public purpose' test, the court determines whether the government seeks to 'effectuate public policy' or to adjudicate 'private rights.'" *Mirant*, 398 F.3d at 1109 (quoting *Continental Hagen Corp.*, 932 F.2d at 833). If the primary purpose of the suit is to effectuate public policy, then the exception to the automatic stay applies. However, "[a] suit does not satisfy the 'public purpose' test if it is brought primarily to advantage discrete and identifiable individuals or entities rather than some broader segment of the public." *Id.*

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[11] Our controlling precedent, as we have discussed, quite plainly states satisfying either the "pecuniary interest" or "public policy" test will suffice. That being said, "[v]iewing the tests as disjunctive perhaps does not always make sense, however." *First Alliance*, 264 B.R. at 647 n. 11. One can conceive of actions in which it would make more sense to analyze the tests as conjunctive in order to effect the Congressional purpose of "permit[ing] governmental units to pursue actions to protect the public health and safety," but still requiring governmental entities to submit to bankruptcy court jurisdiction when pursuing actions "to protect a pecuniary interest in property of the debtor or property of the estate." *Id* at 646. A conjunctive, rather than a disjunctive, analysis would be more consistent with the oft-quoted floor statement of Rep. Edwards. 124 Cong. Rec. H11,089 *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45); *see* note 6. This case may provide an example of why application of the "pecuniary interest" test in isolation may not provide the most satisfactory analysis of whether the exemption applies.

As the California Supreme Court has explained, a civil action brought by a governmental entity under section 17200 "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *People v. Pacific Land Research Co.*, 141 Cal. Rptr. 20, 24 (Cal. 1977). The character of a section 17200 action is not affected by the choice of restitution as a remedy. As the Court further explained:

> The request for restitution on behalf of vendees in such an action is only ancillary to the primary remedies sought for the benefit of the public. (*People v. Super. Ct. (Jayhill)*, 9 Cal.3d 283, 286, 107 Cal.Rptr. 192, 507 P.2d 1400.) While restitution would benefit the vendees by the return of the money illegally obtained, such repayment is not the primary object of the suit, as it is in most private class actions.

Id.

[10] In this case, as in every case involving restitution, a successful result for the governmental entities may well result in money being paid to private parties, either indirectly, through the bankruptcy court, or through direct payments. However, the section 17200 restitution claims filed by the governmental entities in this case are fundamentally law enforcement actions designed to protect the public. As such, the restitution claims also satisfy the "public policy test."

D

The Corporation contends that 11 U.S.C. section 541 trumps 28 U.S.C. section 1452(a), permitting removal of these actions because the choses in action are property of the estate. To the extent that the Utility had the right to bring a claim against the Corporation pursuant to section 17200, the

Corporation is correct. Section 541 defines the property of the bankruptcy estate, which is subject to the bankruptcy court's *in rem* jurisdiction. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1282 (9th Cir. 1983). The Utility's chose in action would be property of the bankruptcy estate pursuant to section 541(a)(1). *Traders State Bank of Poplar v. Mann Farms, Inc. (In re Mann Farms, Inc.)*, 917 F.2d 1210, 1214 (9th Cir. 1990); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986).

However, the governmental entities are not asserting the Utility's claim in the lawsuit. They are pursuing a section 17200 remedy as a matter of state statutory right independent of any claim that the Utility could have pursued. Cal. Bus. & Prof. Code section 17204 provides:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.

Section 17204 confers standing to bring actions under section 17200 on those who have been injured as the result of unfair competition and also on designated governmental entities for purposes of public protection. The most recent amendment to section 17204, which does not affect this case, was made by passage of Proposition 64 in 2004 by the California electorate. The initiative's finding and declaration of purpose provided that "[i]t is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Initiative Measure (Prop. 64) § 1(f). The initiative further declared that "[i]t is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws." *Id.* at § 1(g). This statement of purpose is in accord with the long history of the Unfair Practices Act. *See, e.g., People v. Centr-O-Mart*, 214 P.2d 378, 380 (Cal. 1950) (holding that the Attorney General could pursue actions under the predecessor statute to enforce the State's interest in public welfare).

The government's right to pursue a cause of action under section 17200 is separate from, and not derivative of, the Utility's right to assert an action as a debtor-in-possession. The government's right of action under section 17200 is not part of the bankruptcy estate under section 541.[12]

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[12] The California Supreme Court's recent decision in *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 32 Cal. Rptr. 3d 498 (Cal. 2005) does not alter this conclusion. In *Altus*, the court considered whether the Attorney General had the authority to pursue a section 17200 action relating to an insolvent insurance company when the California Insurance Commissioner had been appointed to act as a conservator or liquidator. Construing California law, the court concluded that the Insurance Commissioner had the exclusive right to pursue such remedies under the California Insurance Code, which is not at issue in this case. The

The fact that all or part of a restitution award might be returned to the Utility or the bankruptcy estate does not change the analysis. Assuming, *arguendo*, that a restitution award would constitute property of the bankruptcy estate, that does not mean that section 541 would obviate the law enforcement exception to removal contained in 28 U.S.C. section 1452(a). Indeed, that is the point of the exception: to define claims or causes of action that are not subject to removal despite the actual or potential existence of a related federal bankruptcy case.

IV

Through various provisions of the Bankruptcy Code, Congress has evidenced its intent that a governmental unit's police or regulatory action not be litigated in federal bankruptcy court. Section 362(b)(4) of the Bankruptcy Code exempts such an action from the reach of the automatic stay; 28 U.S.C. section 1452(a) exempts such an action from removal to bankruptcy court. The critical determination is whether a particular government action qualifies as a "police or regulatory action" under the principles we have articulated, and that determination must be made on the basis of a case-specific inquiry.

[11] In analyzing the case at hand, we conclude that the section 17200 state lawsuits filed by the Attorney General and San Francisco constitute police or regulatory power actions that cannot be removed to bankruptcy court under 28 U.S.C. section 1452(a). Although we agree with much of the district court's thoughtful opinion, we reverse

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obligations, rights, and responsibilities of the California Insurance Commissioner and a federal bankruptcy debtor-in-possession differ. Further, in examining the specific action at hand, the court also concluded that the primary purpose of the Attorney General's suit was to benefit defined individuals and entities, the protection of which was already committed to the Insurance Commissioner, rather than to benefit the general public interest.

the judgment, with the direction to remand the entire action to state court.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, dissenting in part:

I join the holding on appellate jurisdiction in Part II of the opinion, but I cannot join my colleagues' determination that appellants' restitution claims do not have a pecuniary purpose and satisfy the "public policy" test.

We start at the same place but our reasoning diverges. The starting point, set forth by the majority in footnote nine, is former Representative Don Edwards' statement that the exception is to be given a narrow construction and is "'not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor, or property of the estate.'" *In re First Alliance Mortgage Co.*, 264 B.R. 634, 646 (C.D. Cal. 2001) (quoting 124 Cong. Rec. H11,089 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45) (Slip at 177 n.9).

The majority appears to overlook this advice in concluding that the restitution claims pass the "pecuniary purpose" test. It restates the standard as "'to prevent suits that would allow a governmental unit to obtain an advantage over creditors or potential creditors in the bankruptcy proceeding.'" (Slip at 179, quoting *Lockyer v. Mirant*, 398 F.3d 1098, 1109 (9th Cir. 2005)). The majority then reasons that because appellants "will receive no pecuniary advantage" if successful, the purposes of the restitution claims are not primarily pecuniary. (Slip at 179). The majority further concludes that because restitution "will benefit the public welfare by penalizing past unlawful conduct and deterring future wrongdoing," the claims do not "primarily advance the government's pecuniary interests." (Slip at 180).

This logic is less than persuasive. First, the public's interest in "penalizing past unlawful conduct and deterring future wrongdoing" is directly addressed by appellants' claims for injunctive relief and civil penalties, which we all agree fall within the police or regulatory power exception.

Second, if, as Representative Edwards stated, the exception is "not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor, or property of the estate," it makes no difference whether the restitution claims benefit appellants or the debtor because their primary purpose remains pecuniary gain. In addition, it should be noted that precisely who or what entity would receive the restitution award is unclear.[1]

The majority seeks to bolster its conclusion that the restitution claims pass the "pecuniary purpose" test by opining that the claims also satisfy the "public policy" test. (Slip at 180-81). The shifts in the majority's analysis, however, expose the flaws in its determination. The majority initially states that the district court "correctly analyzed the individual claims, not the § 17200 actions as a whole." (Slip at 178). When addressing the "public policy" test, however, the majority instead relies on the California Supreme Court's statement that "a civil action brought by a governmental entity under § 17200 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.' *People v. Pac. Land Research Co.*, 141 Cal. Rptr. 20, 24 (Cal. 1977)." (Slip at 181). The majority then asserts that the "character of a § 17200 [proceeding] is not affected by the choice of restitution as a remedy." (Slip at 181). These shifts from evaluating individual claims, to looking at the action as a whole, and from analyzing the individual causes of action, to accepting broad remedies, is not only confusing, but results in a definition of the "public policy" test that eviscerates the "pecuniary purpose" test. It makes little sense to analyze the individual claims in a § 17200 action to determine whether they meet the "pecuniary purpose" test if the court is going to conclude that an entire §

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[1] The parties disagree as to who should receive any restitution award. The majority recognizes that "all or part of a restitution award might be returned to the Utility or the bankruptcy estate," but does not determine the question. (Slip at 184).

17200 action automatically meets the "public purpose" test when one or more of the claims asserted in the action concern matters of safety or welfare.

In determining whether the restitution claims meet the "public policy" test, I would be consistent with our approach to the "pecuniary purpose" test, and look at the individual claims, rather than the broad purpose of the § 17200 action. Here, applying the "public policy" test as set forth by the majority, the restitution claims do not seek to "effectuate public policy" or to adjudicate "private rights." *Mirant*, 398 F.3d at 1109. As previously noted, the § 17200 action's "public policy" concerns are addressed in its claims for injunctive relief and civil penalties, rather than in the restitution claims. Also, the majority's comment that if restitution is warranted "California and San Francisco will receive no pecuniary advantage" (Slip at 179) certainly implies that the restitution claims assert "private rights."

I would remain faithful to the clear standard set forth by former Representative Edwards. If the government claim is "to protect a pecuniary interest in property of the debtor, or property of the estate," it does not pass the pecuniary interest test.[2] Here, although the § 17200 action's claims for injunctive relief and civil penalties seek to protect the public safety and welfare, its restitution claims have the primary purpose of protecting a pecuniary interest. Moreover, appellants' restitution claims when analyzed on their own do

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[2] This approach is consistent with our recent opinion in *Mirant*, 398 F.3d at 1109. There we held:

> The Attorney General's section 16 Clayton Act suit clearly satisfies the "pecuniary purpose" test. After having been trimmed down by the district court, the suit now seeks only divestiture. The Attorney General does not seek a monetary recovery, and asserts no interest of the state in the three power plants that are the subject of his suit. Rather, the Attorney General seeks only an injunction that would require Mirant to divest itself of the plants.

not meet the public policy test. Accordingly, I would find that the district court properly retained jurisdiction over the restitution claims, and affirm the district court's judgment in its entirety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Appellee and Cross-Appellant

v

PG&E CORPORATION and DOES 1-150,

Defendant/Appellant

and

Cross-Appellee

/

No C 02-3668 VRW

CYNTHIA BEHR,

Plaintiff/Appellee,

v

PG&E CORPORATION,

Defendants/Appellants

/

No C 02-4071 VRW

PEOPLE OF THE STATE OF CALIFORNIA ex rel BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Plaintiff/Appellee and Cross-Appellant

v

PG&E CORPORATION,

Defendants-Appellants and Cross-Appellees.

/

No C 02-4330 VRW

AMENDED ORDER

The Pacific Gas & Electric Company (the utility) is currently involved in bankruptcy proceedings. Bankr No 01-30923. On June 14, 2002, the bankruptcy court issued a memorandum decision on three motions to remand in the above captioned bankruptcy actions the utility's parent company, the Pacific Gas & Electric Corporation (the corporation). On June 20, 2002, the bankruptcy court entered its final order of remand. Once or more party to each of the above-captioned actions has appealed from that decision. For the reasons set forth below, the bankruptcy court's order of remand is REVERSED in part and AFFIRMED in part.

I

The utility, a subsidiary of the corporation, filed for Chapter 11 bankruptcy protection on April 6, 2001. Still pending in bankruptcy court are competing plans for reorganization of the utility proposed by, on the one hand, the utility and the corporation and, on the other hand, the California Public Utilities Commission (CPUC) and the official creditor's committee.

A

On January 10, 2002, Bill Lockyer, Attorney General of the State of California (the AG), filed a complaint on behalf of the people of the State of California (the AG action). AG Compl (02-4330 Doc # 15, Exh # 2, Exh A). In the complaint, the AG asserts a single cause of action, violation of California's Unfair Competition Law (UCL), Cal Bus & Prof § 17200 *et seq*. *Id* at 26-29, ¶¶ 108-115. The corporation removed the AG action to the bankruptcy court on February 2, 2002. Not of Removal of AG Action (02-4330 Doc # 15, Exh # 2). The AG moved to remand on March 1, 2002.

As the bankruptcy court summarized, the AG's complaint boils down to six broad factual allegations: (1) in

order to obtain CPUC approval of the utility's reorganization plan, the corporation and its directors agreed to give "first priority" to the utility's capital needs as necessary and prudent to meet the corporation's obligations to serve or operate the utility in a prudent and efficient manner (the first priority condition); (2) in spite of the agreement to comply with the first priority condition, the corporation advanced its own interests above those of the utility or the utility's ratepayers; (3) the corporation failed to disclose to the CPUC its true intentions not to abide by the first priority condition in seeking approval for its reorganization plan; (4) the corporation transferred ratepayer-funded assets from the utility to the corporation in violation of the first priority condition; (5) the corporation appropriated over $4 billion in revenues from ratepayers billed at high frozen rates and (6) the corporation engaged in a series of "ring-fencing" transactions to place corporation assets and assets of other corporation affiliates beyond the reach of the utility, thereby deliberately making it impossible for the corporation to comply with the first priority condition. *In re Pacific Gas & Electric Company (In re PG&E)*, 281 BR 1, 4 (Bankr ND Cal 2002). Taken collectively, these and related claims were characterized by the bankruptcy court, for purposes of ruling on the motions to remand, as the "First Priority" claims. *Id.* As discussed below, these claims are mirrored by many of those asserted in the complaints filed by the City and County of San Francisco and Cynthia Behr.

The AG's complaint also asserts a number of claims relating to the corporation's support of a proposed plan of reorganization for the utility, which would, according to the AG's complaint, permit the corporation to place the utility's electricity transmission, gas transmission and electricity generation business outside the control of the CPUC. The bankruptcy court denominated these and related claims collectively as the "Plan" claims. *Id* at 5. The bankruptcy court's ruling regarding the Plan claims has not been challenged on appeal.

As relief for the alleged misconduct, the AG seeks an injunction against the corporation and its officers barring them from engaging in further violations of the UCL, the appointment of a receiver, an order "directing defendants to pay restitution according to proof," an order assessing civil penalties of not less than $500 million and the costs of suit. AG Compl (02-4330 Doc # 15, Exh # 2) at 29, Prayer. The AG does not identify to whom restitution, if found warranted, is to be paid. The context of the AG's complaint, however, makes plain that restitution, if warranted, would flow from the corporation to the utility, the entity from which the ratepayer-funded assets were taken.

B

On February 11, 2002, the City and County of San Francisco and the People of the State of California (collectively, the city) filed a complaint in San Francisco county superior court alleging that, from 1997 through 2000, the utility and the corporation unlawfully conspired to transfer $4.6 billion from the utility to the corporation (the city action). City Compl (02-3668 Doc # 12, Exh # 2, Exh A) at 2, ¶ 3. The complaint further alleges that the utility received roughly $663 million in tax payments in excess of taxes actually paid by the corporation on behalf of the utility. *Id.* The city's complaint alleges three causes of action: (1) conversion, (2) unjust enrichment and (3) UCL violations. *Id.* at 10-13, ¶¶ 41-58. The corporation removed the city action to the bankruptcy court on March 4, 2002. Not of Removal (02-3668 Doc # 12, Exh #2). The city moved to remand on March 22, 2002.

The city's UCL claims, while less articulated than the AGs, are essentially identical to the AG's First Priority claims. The conversion and unjust enrichment claims are twin efforts to claim relief for the same allegedly wrongful act by another means. The city's conversion claim involves allegations that the corporation took $5.2 billion from the

utility between 1997 and 2000, thereby enabling the utility to request and receive permission to increase rates. *In re PG&E*, 281 BR at 5. The city's unjust enrichment claim is based on an allegation that the corporation took money from the utility, thereby leaving the utility without sufficient funds to provide adequate electric service to its customers. *Id.*

Like the AG, the city seeks as relief an injunction against the corporation and its officers, the appointment of a receiver, "an order directing defendants to pay restitution in an amount according to proof," an "order requiring PG&E Corporation and its affiliates, *other than [the utility]*, to disgorge all amounts obtained from [the utility] in violation of [the UCL]," civil penalties and the costs of suit. City Compl (02-3668 Doc # 12, Exh # 2), Exh A at 13-14, Prayer (emphasis added). Like the AG, the city does not identify to whom restitution, if found to be necessary, should be paid. It is similarly clear from the city's complaint, however, that restitution, if warranted, would flow from the corporation to the utility.

C

On February 14, 2002, Cynthia Behr (Behr), a judgment creditor of the utility, filed a complaint in Santa Clara County superior court (the Behr action). Behr Compl (02-4071 Doc # 6, Exh # 2, Exh A). Behr's claim against the utility is for a civil judgment of $7,500,000 plus interest entered in her favor as a prevailing plaintiff in the lawsuit, filed and tried in Santa Clara County superior court, *Cole Behr, et al v Pacific Gas & Electric Company*, CV 737556. As the bankruptcy court noted, Behr's complaint duplicates almost verbatim the AG's complaint. *In re PG&E*, 281 BR at 5-6. The primary substantive difference is that Behr's complaint states causes of action for (1) violations of the UCL, (2) violations of the Uniform Fraudulent Transfer Act, Cal Civ Code § 3439, (3) conspiracy and (4) violations of California Bulk Sales Law, Cal Comm Code § 6107. *Id* at

24-33, ¶¶ 116-156. Behr seeks an order directing the utility and the corporation to set aside $10,000,000 to satisfy plaintiff's outstanding claim as a judgment creditor and other miscellaneous relief. *Id* at 34-35, Prayer. The corporation removed the Behr action to the bankruptcy court on March 8, 2002. Not of Removal (02-4071 Doc # 6, Exh # 2). Behr moved to remand on April 1, 2002.

Behr's UCL claims, like those of the AG, fall into the two above-identified categories: First Priority and Plan claims. Behr's additional state law claims rely on the same factual allegations as her UCL claims. The relief Behr seeks is directed primarily to the preservation by the utility of sufficient funds to satisfy her claim against the utility. *See* Behr Compl (02-4071 Doc # 6, Exh # 2), Exh A at 34-35, Prayer.

D

The corporation opposed all three motions to remand. It also moved to dismiss the complaints in all three actions pursuant to FRCP 12(b) (6). In the alternative, the corporation sought a stay of all three actions until the effective date of the utility's plan of reorganization. The bankruptcy court invited further briefing on the three motions to remand and deferred resolution of the corporation's FRCP 12(b)(6) motions pending decision on the motions to remand. *See In re PG&E*, 281 BR at 6.

On June 14, 2002, the bankruptcy court issued a memorandum of decision on all three motions to remand. *In re PG&E*, 281 BR 1. That decision addressed six questions in particular: (1) whether sovereign immunity bars removal of the AG and city actions; (2) whether the Plan claims asserted in the AG and Behr actions fall within the exclusive jurisdiction of the bankruptcy court; (3) whether the First Priority claims asserted in the AG and city actions are exempt from removal under 28 USC § 1452(a); (4) whether Behr's First Priority claims should be equitably remanded

under 28 USC § 1452(b); (5) whether Behr may prosecute her fraudulent transfer and bulk sales claims in state court and (6) whether the city may prosecute its conversion claims in state court. *In re PG&E*, 281 BR at 6.

In that decision, the bankruptcy court determined that (1) the Eleventh Amendment did not bar removal of the AG and city actions, *id* at 6-7; (2) the Plan claims were preempted and removable, *id* at 7-10; (3) the First Priority claims were not removable and the bankruptcy court would not exercise supplemental jurisdiction over them, *id* at 10-13; (4) Behr's UCL claims should be equitably remanded under 28 USC § 1452(b), *id* at 13; (5) Behr's fraudulent transfer and bulk sales claims properly belonged to the estate and so should not be remanded, *id* at 13-14; and (6) the city's conversion and unjust enrichment claims belonged to the estate and so should not be remanded, *id* at 14-15.

II

The standard of review of bankruptcy court decisions varies with the question raised on appeal. Conclusions of law are reviewed *de novo*. *In re Pace*, 67 F3d 187, 191 (9th Cir 1995). Mixed questions of fact and law are likewise reviewed *de novo*. *In re Bammer*, 131 F3d 788, 792 (9th Cir 1997). Findings of fact are reviewed for clear error. *Pace*, 67 F3d at 191.

A

The AG and the city argued that the Eleventh Amendment bars removal of their actions to federal court. The bankruptcy court ruled that it did not. The AG has appealed that portion of the bankruptcy court's ruling. *See* AG Resp (02-4330, Doc # 18) at 22-25.

While the Eleventh Amendment serves to "avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," it does

not apply if a state is subjecting another party to litigation. *Puerto Rico Aqueduct and Sewer Auth v Metcalf & Eddy, Inc*, 506 US 139, 146 (1993). Under the terms of the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted against* one of the United States * * * ." US Const, Amend XI (emphasis added). The Supreme Court has "consistently held that an unconsenting State is immune from suits brought in federal court by her own citizens as well as by citizens of another State." *Puerto Rico*, 506 US at 144. Both the language of the Eleventh Amendment and the Supreme Court's jurisprudence clearly limit the scope of immunity solely to suits brought against a state in federal court.

It is settled that "where a state is suing parties who are not in other States, the jurisdiction of this Court is not exclusive and that those suits 'may now be brought in or removed to the Circuit Courts (now the District Courts)' * * * ." *Illinois v Milwaukee*, 406 US 91, 101 (1972) (quoting *Ames v Kansas*, 111 US 449, 470 (1884)). In *Ames*, the Court addressed specifically the removability of an action commenced by a state to the federal courts. *See Ames*, 111 US at 470.

While the Ninth Circuit has not directly addressed the issue at bar, the Fifth Circuit has noted, "Of course, the eleventh amendment is inapplicable where a state is a plaintiff." *Huber, Hunt & Nichols, Inc v Architectural Stone Co, Inc*, 625 F2d 22, 24 n6 (5th Cir 1980). In addition, the Federal Circuit has stated, "[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state." *Regents of the Univ of Cal v Eli Lilly & Co*, 119 F3d 1559, 1564 (Fed Cir 1997), *cert denied*, 523 US 1089 (1998).

Although recent Supreme Court decisions may have expanded the Eleventh Amendment's scope in other contexts, these decisions have left unchanged the principle that the amendment applies only to suits against a state. *See*

Federal Maritime Comm'n v South Carolina State Ports Authority, 535 US 743 (2002) (Eleventh Amendment bars Federal Maritime Commission from adjudicating private complaints against state-run port); *Alden v Maine*, 527 US 706, 714 (1999) (Eleventh Amendment bars private suits under Fair Labor Standards Act against states); *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261 (1997) (Eleventh Amendment bars federal court action by Indian tribe against state).

No support for the AG's position can be found in the language of the amendment, any Supreme Court case or any other appellate case. The AG cites two district court cases, neither of which was appealed, that applied sovereign immunity to removal of cases commenced by a state. *See Moore v Abbott Laboratories, Inc*, 900 F Supp 26 (SD Miss 1995); *People v Steelcase, Inc*, 792 F Supp 84 (CD Cal 1992). Neither case, however, cited or considered *Illinois* or *Ames*.

In contrast, a number of district courts have explicitly declined to follow *Moore* or *Steelcase* and instead concluded that Eleventh Amendment immunity does not apply to removal of actions in which the state is a plaintiff. *See School Bd of the Parish of St Charles v Quala Sys, Inc*, 159 F Supp 2d 295, 297-98 (ED La 2001); *In re Rezulin Prod Liab Lit*, 133 F Supp 2d 272, 297 (SDNY 2001); *Regents of the Univ of Minn v Glaxo Wellcome, Inc*, 58 F Supp 2d 1036, 1039 (D Minn 1999); *Kansas ex rel Stovall v Home Cable Inc*, 35 F Supp 2d 783, 788-89 (D Kan 1998); *Vermont v Oncor Communications*, 166 FRD 313, 320-21 (D Vt 1996); *South Dakota State Cement Plant Comm'n v Wausau Underwriters Ins Co*, 778 F Supp 1515, 1522 (DSD 1991); *see also New York v Citibank, NA*, 537 F Supp 1192 (SDNY 1982) ("[I]t is clear that an action can be removed notwithstanding the fact that a state is a plaintiff.").

The bankruptcy court did not err in "believ[ing] that the reasoning of the majority of the cases is more

persuasive[] and conclud[ing] that the Eleventh Amendment does not preclude removal of the AG action or the [city] action to the bankruptcy court." *In re PG&E*, 281 BR at 7. Accordingly, the bankruptcy court's ruling that the Eleventh Amendment does not bar removal of the AG action to federal bankruptcy court is AFFIRMED.

B

The corporation challenges the bankruptcy court's order that the First Priority claims of the AG and the city be remanded, pursuant to 28 USC § 1452(a). *In re PG&E*, 281 BR at 10-13. The bankruptcy court rightly concluded that the removal analysis it was required to conduct should be governed by section 1452 and not the general removal statute, 28 USC § 1441. Section 1441 itself provides for removal of cases over which the district courts have original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." 28 USC § 1441(a). Section 1452 contains such an express provision. Additionally, as the bankruptcy court noted, section 1452 applies with greater specificity to the removal issues raised by the motions to remand in the above-captioned actions. *See In re Padilla*, 222 F3d 1184, 1192 (9th Cir 2000) ("Statutory construction canons require that where both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of the enactment, and must be applied first.") (internal quotation marks and citation omitted).

The corporation also argues that the First Priority Claims may not be removed because they belong to the debtor's estate, i.e., the estate of the utility. Because the injury sustained and the recovery sought by the AG and the city relate to funds allegedly improperly transferred from the utility to the corporation, the corporation argues that the AG and the city lack standing to assert their claims. Under 11 USC § 541(a) (1), the debtor's estate includes "all legal or

equitable interests of the debtor in property as of the commencement of the [bankruptcy proceeding]." Section 541 (a) (1) has been construed broadly to include legal claims that the debtor could have brought as of the commencement of the bankruptcy proceeding. *In re Educators Group Health Trust,* 25 F3d 1281, 1283-84 (5th Cir 1994). The court must examine the relationship between the harm asserted by the non-debtor to determine whether this harm "necessarily follows from the fact that the debtor has been injured." *Id* at 1285 (finding that a creditor's claim for "indirect harm" is the property of the estate). If a legal claim belongs to the debtor's estate, then only the estate's trustee has standing to assert the legal claim. *Id* at 1284. The corporation argues that the AG and the city lack standing to assert their UCL claims, because the claims are the property of the debtor's estate.

The AG and the city argue that the UCL confers broad and independent standing to assert the UCL claim under state law considerations. *See* AG Br (02-4330 Doc # 18) at 17-19; City Br (02-3668 Doc # 21) at 12-17; Cal Bus & Prof Code § 17200 (creating a private cause of action in favor of "any person acting for the interests of itself, its members, or the general public"). The AG and the city misconstrue the appropriate legal standard. First, federal constitutional limitations on standing govern in federal bankruptcy proceedings. *Lee v Am Nat'l Ins Co*, 260 F3d 997, 1001-02 (9th Cir 2001). In *Lee*, the Ninth Circuit found that the broad standing available under the UCL in state courts is limited by the Article III constitutional requirements when the case is heard in federal court. *Id* (finding that a private individual bringing suit under the UCL who did not meet the injury in fact requirements of Article III did not have standing to litigate in federal court). Second, section 541 (a) (1) contemplates situations in which the debtor and another entity each have independent standing to bring the legal claim. *See In re Educators Group Health Trust*, 25 F3d at 1284. If the court finds that the claim is the

property of the debtor's estate, the independent standing of the other entity is extinguished. *Id.*

The AG and the city counter that their claims under the UCL are not property of the debtor's estate, because their claims are a "law enforcement action." AG Br (02-4330 Doc #18) at 18; City Br (02-3668 Doc # 21) at 11. In essence, they argue that the harm underlying their UCL causes of action does not "necessarily follow from the fact that the debtor has been injured." *In re Educators Group Health Trust*, 25 F3d at 1285 (emphasis omitted). This argument closely relates to the remand analysis under section 1452(a). Accordingly, the court deals with both the standing issue under section 541 (a) (1) and the remand issue under section 1452 (a) at the same time.

1

It would appear that the interpretation of section 1452(a) has not been considered by the Ninth Circuit. Section 1452 (a) provides:

> A party may remove any claim or cause of action in a civil action other than * * * a civil action *by a governmental unit to enforce such governmental unit's police or regulatory power*, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under [28 USC § 1334].

Id (emphasis added). The Ninth Circuit has considered nearly identical language in section 362(b)(4) of the Bankruptcy Code, which reads:

> The filing of a petition * * * does not operate as a stay
>
> * * *

> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding *by a governmental unit * * * to enforce such governmental unit's * * * police and regulatory power*, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding *by the governmental unit to enforce such governmental unit's * * * police or regulatory power*.

11 USC § 362(b)(4) (emphasis added).

The utility argues that the police or regulatory authority under section 1452 should be interpreted as coextensive with the authority in the automatic stay provision of the bankruptcy code, 11 USC § 362(b)(4). The bankruptcy court rejected this argument, reasoning as follows:

> Section 362(b) is inapplicable to the issues before it. * * * The pertinent language of the two sections is nearly identical, but the cases considering the pecuniary purpose and public policy issues have focused on whether as a matter of public policy there should or should not be an exception to the automatic stay. * * * But whether the automatic stay does or does not apply has little to do with whether actions - stayed or not - may be removed to the bankruptcy court. Nothing suggests that automatic stay considerations should inform the court's decision under [s]ection 1452.

In re PG&E, 281 BR at 11.

The court finds the bankruptcy court's conclusory reasoning unpersuasive and holds that the "police or regulatory power" language in sections 1452(a) and

362(b)(4) should be interpreted as coextensive. First, it is a "well-established canon of statutory interpretation that where Congress uses the same word or phrase throughout a statute, Congress generally intends the word or phrase to have the same meaning each time Congress uses it." *Montero-Martinez v Ashcroft*, 277 F3d 1137, 1142 (9th Cir 2001). Congress used the same phrase, "by a governmental unit to enforce such governmental unit's police or regulatory power," in both section 1452(a) and section 362(b)(4). If the legislative history shows that different meanings were intended, identical words may be construed differently. *Vanscoter v Thompson*, 920 F2d 1441 (9th Cir 1990). Here, Congressional intent, which can be inferred from the symmetrical structure of sections 1452 and 362(b) (4), suggests that Congress intended that "police or regulatory power" have the same meaning in both sections. *In re Reliance Group Holdings, Inc*, 273 BR 374, 385 (Bankr ED Pa 2002); 1 Collier on Bankruptcy, ¶ 3.07[3] (15th ed rev 2001) ("It would seem, therefore, that the congressional intent was to make those types of civil actions that are not subject to removal correspond to civil actions that are excepted from the automatic stay."). Section 1452(a) relates closely to the Bankruptcy Code even though it was codified into Title 28 rather than Title 11. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L No 98-353, tit I, § 103(a), 98 Stat 335 (July 10, 1984) (titling section 1452(a) "[r]emoval of claims related to bankruptcy cases"). Accordingly, canons of statutory construction suggest that the two provisions should be construed as coextensive.

Second, the sections should be construed as coextensive because the sections were enacted for the same purpose. Both sections allow governmental units to pursue important state interests "unfettered by bankruptcy proceedings." *In re Reliance Group*, 273 BR at 385 (finding that the "purpose behind each exception is the same"). Section 362(b)(4) allows states to protect important state

interests by pursuing litigation against a debtor despite simultaneous bankruptcy proceedings. Likewise, section 1452(a) allows states to protect important state interests by bringing these section 362(b)(4) actions in state court rather than federal court. Both sections respect the state's interest in protecting the public safety and welfare. *In re Chapman*, 264 BR 565, 569 (9th Cir BAP 2001).

As limited exceptions, both sections also respect the bankruptcy court's jurisdiction. Not all actions brought by governmental units qualify, only actions intended to enforce the state's police or regulatory power. Accordingly, these sections both serve the purpose of protecting the jurisdiction of the bankruptcy court to determine all issues relating to a bankruptcy case and protect the interests of the debtor's creditors. *In re Lazar*, 200 BR 358, 370 (CD Cal 1996). *See also Young v Higbee Co*, 324 US 204, 210 (1945) ("[H]istorically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.").

Third, interpreting the sections as coextensive promotes coherence in applying the statutory standard. If section 362(b) (4) were interpreted more broadly than section 1452(a), then some state court actions would not be stayed but could be removed. If the state's interest in protecting its citizens is strong enough to override the automatic stay, then there is no reason to limit the governmental unit's ability to protect its citizens in its own courts. *See In re Adams Delivery Serv. Inc*, 24 BR 589, 592-93 (9th Cir BAP 1982) ("[W]e believe it would be anomalous to interpret the 'police and regulatory' provision contained in § 1452 so as to permit removal of causes of action that are not subject to the automatic stay because of § 362(b)(4).") .

By enacting both sections, Congress intended to ensure the state's ability to bring actions under its police or

regulatory power and to bring such actions in state court. On the other side, if section 362(b)(4) were interpreted more narrowly than section 1452(a), then some state court actions would be stayed but could not be removed. This would limit the ability of the bankruptcy court to accomplish its role of determining whether the action should proceed, in view of the status of the bankruptcy case. *See In re Lazar*, 200 BR at 369.

Construing the police or regulatory power provision of sections 1452 (a) and 362(b)(4) as coextensive is consistent with the practice of other district and bankruptcy courts that have considered the question. *See In re Reliance Group Holdings, Inc*, 273 BR 374 (Bankr ED Pa 2002); *In re Lazar*, 200 BR 358 (CD Cal 1996); *In re Altamirco*, 56 BR 199 (Bankr CD Cal 1986); *In re Adams Delivery Serv Inc*, 24 BR 589.

2

a

The Ninth Circuit has articulated two overlapping tests to determine whether an action is aimed at enforcing the police or regulatory power of a governmental unit: the pecuniary purpose test and the public policy test. "The pecuniary purpose test reviews whether the government acted primarily to protect its pecuniary interest in the debtor's property or the public safety and welfare." *In re Chapman*, 264 BR at 569 (citation omitted). The test has been extended to include actions where the governmental unit acts primarily to protect the pecuniary interest of its citizens. *In re Charter First Mortgage, Inc*, 42 BR 380, 382 (Bankr D Or 1984). "The public policy test examines whether the governmental unit's actions are motivated to effectuate public policy or private rights." *Id*. The court must determine whether the governmental unit intends to exercise its police or regulatory power rather than whether the governmental unit's claim will succeed. *See In re First*

Alliance Mortgage Co. (In re FAMCO), 263 BR 99, 109 (9th Cir BAP 2001) ("Under § 362(b)(4), the bankruptcy court need not * * * determine whether the governmental unit's exercise of its police or regulatory power is a legitimate one.") (internal citation omitted).

Although "[s]atisfaction of either test will suffice" to exempt an action from the automatic stay, the court must first determine which of the two tests should be considered. Each test gives the court two choices; either the governmental unit is pursuing primarily the public welfare or it is pursuing primarily another interest. The other interest in the pecuniary interest test is the pecuniary interest of the governmental unit or its citizens in the suit. The other interest in the public purpose test is the effectuation of private rights. Accordingly, the court must examine what non-public welfare interest the party opposing remand is alleging in order to determine which test to apply or whether to apply both tests. *See In re Pacific Gas & Electric Co*, 263 BR 306, 318 n17 (Bankr ND Cal 2001) (noting that the actions of a governmental unit were primarily covered by the public policy test rather than the pecuniary interest test). For example, in some cases, the party opposing remand will allege that the governmental unit is pursuing the effectuation of a non-pecuniary private right. In such a situation, the court should apply only the public purpose test. Applying the pecuniary interest test would not be appropriate, because the pecuniary interest test only gives two options, either the government is pursuing primarily a pecuniary interest or it is pursuing primarily the public welfare. Where the government is pursuing a non-pecuniary private right, it is neither pursuing a pecuniary right nor is it pursuing the public welfare.

"The legislative history of § 362(b)(4) indicates that when a debtor is sued by a governmental unit in order 'to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory

laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.'" *In re FAMCO*, 263 BR at 107 (quoting HR Rep No 595, 95th Cong, 1st Sess 343 (1977), *reprinted in* 1978 USSCAN 5963, 6299; S Rep No 989, 95th Cong, 2d Sess 52 (1978), *reprinted in* 1978 USSCAN 5787, 5838). Courts have found that a variety of actions come under the definition of police or regulatory action in sections 362(b)(4) and 1452(a). *See In re Poule*, 91 BR 83, 87 (9th Cir BAP 1988) (finding that pursuing a civil penalty judgment for fraudulent conduct is within the section 362(b)(4) exception); *In re Rabzak*, 79 BR 966 (Bankr ED Pa 1987) (finding that an action to enforce a local rubbish dumping ordinance is a regulatory action with the section 1452(a) exception); *In re Fresh Approach*, 49 BR 494 (Bankr ND Tex 1985) (finding that state prosecution of an unlicensed produce marketer is within the section 362(b)(4) exception).

Courts have also deemed other actions not police or regulatory actions. *See In re Reliance Group Holdings, Inc*, 273 BR 374 (Bankr ED Pa 2002) (holding that an action to place a company's assets within the control of the state insurance commission was not a police or regulatory action under section 1452(a)); *In re Lazar*, 200 BR 358 (Bankr CD Cal 1996) (finding that a suit against a governmental unit does not qualify for the section 1452(a) exception, which requires a suit brought "by a governmental unit").

The court must consider each of the claims brought by a governmental unit separately to determine whether each claim is barred. *See In re Poule*, 91 BR at 87 (finding that a state's attempt to impose civil penalties comes within the section 362(b) (4) exception but that a simultaneous "order of corrections" requiring an unlicensed contractor to reimburse the person for whom the services were performed is not within the section 326(b)(4) exception).

b

The court must now determine whether the actions brought by the AG and the city under the UCL were intended to exercise the governmental unit's police or regulatory power. Applying section 1452(a) to these actions, the bankruptcy court determined that the AG's and the city's First Priority claims were exercises of their police and regulatory power. The bankruptcy court relied heavily on the California Supreme Court's assertion in *People v Pacific Land Research Co*, 141 Cal Rptr 20 (Cal 1977), that a civil action brought by a state agency under the UCL "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Id* at 24.

The UCL defines unfair competition as "any unlawful, unfair or fraudulent business act or practice." Cal Bus & Prof § 17200; *see also Ballard v Equifax Check Services, Inc*, 27 F Supp 2d 1201, 1207 (ED Cal 1998). The UCL was enacted to deter violations of California law and to require persons who engage in unfair business actions to disgorge their "ill-gotten gains." *Bank of the West v Superior Court*, 2 Cal4th 1254, 1267 (1992). Prohibited business practices under the UCL include any violation of an existing law. *Olszewski v Scripps Health*, 30 Cal4th 798, 827 (2003); *Saunders v Superior Court*, 27 Cal Rptr 2d 438, 441 (Cal App 1994) (holding that a violation of any "civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made" law is sufficient to create UCL liability). The UCL is not merely parasitic upon other laws, however, because a business practice "may be unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski*, 30 Cal4th at 827.

Although the "scope of conduct covered by the UCL is broad, its remedies are limited." *Korea Supply Co v Lockheed Martin Corp*, 29 Cal4th 1134, 1144 (2003). The remedies available in a UCL action brought by a

governmental unit include a restitutionary award, injunctions and civil penalties. *See* Cal Bus & Prof Code § 17200 et seq. These remedies do not include damages or criminal penalties. *Korea Supply Co*, 29 Cal4th at 1144.

In the case at bar, the AG and the city are seeking close to $5 billion in restitution to the utility, civil penalties totaling close to $500 million and various injunctions. *See, e.g.*, AG Compl (02-4330 Doc # 15, Exh # 2) at 29, Prayer. California courts have concluded that an action for injunctive relief and civil penalties filed by a governmental unit under the UCL is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Payne v Nat'l Collection Systems, Inc*, 91 Cal App 4th 1037, 1045 (2001). This comports with the reasoning of *In re Poule* in the section 362(b)(4) context, which held that a state agency's pursuit of civil penalties for fraudulent conduct constitutes an exercise of its police or regulatory power. 91 BR at 87. In this case, the AG and the city allege that they are pursuing civil penalties and injunctions to punish the corporation and deter future misconduct. Accordingly, the court finds that the claims by the AG and the city for civil penalties come under section 1452 (a) and should be remanded to state court.

The court turns to whether the AG's and the city's claim for a restitutionary award meets the police or regulatory power exceptions in sections 1452 (a) and 362(b)(4). The *Payne* court found that an action under the UCL was fundamentally an action for the public welfare because any restitutionary award sought would be merely ancillary to the primary public welfare purpose. *Payne*, 91 Cal App 4th at 1045. The AG and the city argue their requests for restitution are also merely ancillary to their primary public welfare purpose behind the UCL action. The court disagrees. The AG's and the city's complaints contain civil penalty demands totaling nearly $500 million. The primary amount claimed in the litigation, however, is the

return to the utility of close to $5 billion allegedly wrongfully transferred to the corporation. The court agrees with the corporation that such a huge sum of money can hardly be considered "ancillary to the primary remedies sought for the benefit of the public." *Id.*

The AG and the city also argue in the alternative that a restitutionary claim by itself may constitute an exercise of the government's police or regulatory power. The California Supreme Court has concluded that the "essence of the statutory unfair competition claim lies in its restitutionary nature." *Rubin v Green*, 4 Cal4th 1187, 1199 (1993); AG Br (02-4330 Doc # 18) at 15 (*citing Rubin v Green*, 4 Cal4th 1187 (1993)). The court finds the reasoning of the AG and the city unpersuasive. First, restitutionary actions are quintessential examples of the adjudication of private rights. *In re Poule*, 91 BR at 87 (finding that a restitutionary award requires the adjudication of private rights); *Cortez v Purolator Air Filtration Products Co*, 23 Cal4th 163, 178 (2000) (finding that restitution is commonly understood as "a return of property to a person from whom it was acquired"); Black's Law Dictionary (defining "restitution" as the "[r]eturn or restoration of some specific thing to its rightful owner or status") (7th ed 1999). The AG and the city cite public welfare rewards for the government pursuing restitutionary awards, including deterrence and disgorgement of ill-gotten gains. The court finds that these public welfare gains are incidental to the primary purpose of a restitutionary award, which is to restore property to its rightful owner. The public welfare gains cited by the AG and the city exist in every action that adjudicates private rights, even those brought by private parties themselves. Accordingly, the cited gains do not change the primary intent behind a restitutionary action, which is the effectuation of private rights.

Second, the AG and the city argue that the standard of proof for the pecuniary interest test is not whether the

intent of the governmental unit relates "primarily" to the protection of a pecuniary interest. *In re Chapman*, 264 BR at 569. Instead, the AG and the city argue that the standard of proof is merely that the governmental unit's intent is not "solely" for the protection of a pecuniary interest. AG Br (02-4330 Doc # 18) at 16 (*citing In re FAMCO*, 263 BR at 110-111); City Br (02-3668 Doc # 21) at 24-26 (same). Their reasoning is unpersuasive. The "solely" language comes from the Ninth Circuit opinion *In re Universal Life Church*, 128 F3d 1294, 1298-99 (9th Cir 1997). There, an appellate panel adopted the pecuniary interest test, including the "primarily" language. *Id* at 1297. Later in the opinion the appellate panel rejected an argument that the governmental unit must have "no pecuniary motive," or in other words that the governmental unit must not seek the "entry of a money judgment," in order to act using its police or regulatory power. *Id* at 1298-99. As support, the panel stated in dictum that a governmental unit's action is only barred if it is brought "solely to advance a pecuniary interest." *Id*. *See In re Pacific Gas & Electric Co*, 263 BR. 306, 318 n17 (Bankr ND Cal 2001) (construing "solely" language of *In re Universal Life Church* as dictum).

The court finds that the language in *Universal Life Church* does not alter the standard under the pecuniary purpose test. A requirement to show that the government is bringing an action "solely to advance a pecuniary interest" is inconsistent with the standard also adopted by *Universal Life Church*, which merely requires a showing that the government is "primarily" acting to protect a pecuniary interest. *See Universal Life Church*, 128 F3d at 1297. Given this inconsistency, the court notes that *Universal Life Church's* "solely to advance a pecuniary interest of the governmental unit" standard derives from a purported quotation of an earlier opinion, *In re Thomassen*, 15 BR 907, 909 (9th Cir BAP 1981). *In re Thomassen* does not contain the language attributed to it by *Universal Life Church*. *See id*. The Ninth Circuit also appears to be "misreading" the

case, because *In re Thomassen* nowhere describes the pecuniary purpose test in such limited terms. *See In re Pacific Gas & Electric Co*, 263 BR at 318 n17. The court also notes that the "solely" language of *Universal Life Church* is properly seen as dictum in the case because the court was merely rejecting the proposition that the government must have no pecuniary motive. Accordingly, the court finds that the "solely" language from *Universal Life Church* does not change the pecuniary interest standard.

Third, the AG and the city rely on *In re FAMCO*, which holds that restitutionary awards are not necessarily stayed under section 362(b)(4). *In re FAMCO*, 263 BR 99. The court finds the reasoning of this bankruptcy appellate panel case unpersuasive. *In re FAMCO* bases its conclusion that restitutionary awards may constitute police or regulatory actions on what it calls a "trilogy of Ninth Circuit cases." *Id* at 110. The *In re FAMCO* court begins by citing *Universal Life Church* for the proposition that a party supporting a stay must show that the governmental unit's intent is "solely to advance a pecuniary interest." *Id*. The court finds this reasoning unpersuasive and rejects it as discussed above. The *In re FAMCO* court then cites *Berg v Good Samaritan Hospital*, 230 F3d 1165 (9th Cir 2000). In *Berg*, the Ninth Circuit found that a monetary sanctions award against an attorney for a violation of ethical standards was not stayed under section 362(b)(4). *Id* at 1167-68. The monetary sanctions in *Berg* are equivalent to the civil penalties of *In re Poule*, which effectuate private rights rather than seek the public welfare. Accordingly, *Berg* provides no support for the proposition that a restitutionary action is a police or regulatory action.

The *In re FAMCO* court also cites *NLRB v Continental Hagen*, 932 F2d 828 (9th Cir 1991), for the proposition that a governmental unit is acting within its police or regulatory powers if it is seeking merely the entry of a monetary judgment in favor of its citizens, rather than

seeking to enforce such a judgment. *In re FAMCO*, 263 BR at 110-12. *In re FAMCO* misreads *Continental Hagen*. Section 362(b)(4) contains two independent requirements for the exercise of a governmental unit's police or regulatory powers. Under the first requirement, an action is stayed unless the governmental unit intends to exercise its police or regulatory powers. Under the second requirement, this exception is limited to the entry, but not the enforcement, of monetary judgments. *Continental Hagen* considered the difference between the enforcement of a monetary judgment and entry of the judgment. But *Continental Hagen* did so only after the court had determined that the governmental unit intended to use its police or regulatory powers. *See Continental Hagen*, at 834-35 (noting that "once proceedings are excepted from the stay by section 362(b)(4), courts have allowed governmental units to fix the amount of the penalties") (internal quotation omitted). Accordingly, seeking entry, rather than enforcement, of a monetary judgment does not suggest the exercise of police or regulatory power. Seeking entry of a monetary judgment is simply a necessary, but it is not a sufficient, condition to qualify for the police or regulatory power exception.

Finally, the court finds that a restitutionary award of the magnitude that the AG and the city are seeking would substantially affect the disposition of the bankruptcy proceeding. As described above, sections 362(b) and 1452(a) strike a balance between the state's interest in pursuing important interests with the interest of the bankruptcy court in assuring that all claims related to the bankruptcy proceeding be heard at the same time by the bankruptcy judge in federal court. Allowing the AG and the city to pursue an action on behalf of the utility outside the bankruptcy court's jurisdiction would infringe significantly on the purposes of the bankruptcy code. This is especially the case where the AG and the city are pursuing a restitutionary award for approximately $5 billion. *See Young v Higbee Co*, 324 US at 210 ("[H]istorically one of the prime

purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.").

3

Pursuant to the analysis above, the court finds that the civil penalty and injunctive relief in the AG's and the city's complaints must be remanded to state court pursuant to section 1452(a). Accordingly, whether the federal constitutional standing limitations would bar such claims need not be considered, because these claims will be adjudicated in state court. Under section 541(a)(1), a claim not brought by the debtor is the property of the debtor's estate if the debtor could have brought the same claim at the commencement of the bankruptcy proceeding and if the harm alleged "necessarily follows from the fact that the debtor has been injured." *In re Educators Group Health Trust*, 25 F3d at 1283-85 (emphasis omitted). The court finds that neither claim meets the *In re Educators Group Health Trust* standard. First, the "necessarily follows" requirement is based on whether the harm alleged by the non-debtor is directly dependent on the harm suffered by the debtor. In this case, the AG and the city allege injuries to the public welfare caused by unfair business practices. Although related to the debtor's alleged harm, the overarching social harm motivating the AG and the city does not "necessarily follow[]" from the private harm constituting the property of the debtor's estate. Injunctive relief and civil penalties are imposed to deter future violations of the UCL, not to reimburse for the previous alleged harm to the debtor. Accordingly, the court finds that the AG's and the city's civil penalty and injunctive claims are not the property of the utility's estate.

The court finds, on the other hand, that the AG's and the city's restitutionary claims are the property of the utility's estate. The debtor was entitled under the UCL,

section 17204, to bring a private cause of action for the harms alleged in the AG's and the city's restitutionary claims. As explained above, the restitutionary claims are primarily intended to effectuate private rights. A restitutionary claim, by definition, restores an interest in money or property to its rightful owner. A restitutionary claim does not merely "necessarily follow[]" from the harm to the debtor, it is an action to recover the harm to the debtor. Accordingly, the court finds that the AG's and the city's restitutionary claims are the property of the estate under section 541(a)(1).

4

In sum, the court rejects the AG and the city's arguments that its claim for a restitutionary award is an attempt to exercise its police and regulatory powers. The court agrees with the AG and the city that a claim for civil penalties and injunctions is an attempt to exercise its police and regulatory powers. As the court finds that the police or regulatory power provisions in sections 362(b) and 1452 (a) should be read as coextensive, the automatic stay and remand provisions will be considered concurrently. The civil penalty and injunction claims are not subject to the automatic stay pursuant to the exception in section 362(b)(4). Accordingly, the bankruptcy court's remand of the civil penalty and injunction claims is AFFIRMED, pursuant to section 1452(a). The restitutionary award claim does not meet the police or regulatory power exceptions in sections 362(b) or 1452(a). Accordingly, the restitutionary award claim is STAYED and the bankruptcy court's order removing the restitutionary award claim is REVERSED. The court also finds that under section 541 (a)(1), the restitutionary claims are the property of the estate.

C

The bankruptcy court remanded Behr's First Priority claims pursuant to 28 USC 5 1452(b). *In re PG&E*, 281 BR at 13. Section 1452(b) provides, "The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." *Id.* "[A] bankruptcy court's decision to remand under [§ 1452(b)] can be reviewed only by a district court or a bankruptcy appellate panel, and not by a court of appeals or by the Supreme Court." *In re McCarthy*, 230 BR 414, 417 (9th Cir BAP 1999) (internal citation omitted). "Decisions to remand under 28 USC § 1452(b) are committed to the sound discretion of the bankruptcy judge and are reviewed for abuse of discretion." *In re McCarthy*, 230 BR 414, 416 (9th Cir BAP 1999) (internal citation omitted).

The bankruptcy court reasoned that Behr's claims should be remanded because the bankruptcy court was remanding the claims brought by the AG and the city and these claims involve "identical factual issues and similar legal issues." *In re PG&E* at 13. This justification no longer holds, because the court reverses the bankruptcy court's holding, which remanded the restitutionary claims by the AG and the city.

According to the analysis conducted above, Behr's claim for injunctive relief is not the property of the estate. The utility could have brought such an action at the commencement of the bankruptcy proceeding, but the public harm inherent in the injunctive relief does not necessarily follow from the private harm to the debtor. An injunction is imposed to prevent future violations, not to reimburse for the previous alleged harm to the debtor.

Behr's claim for restitutionary relief is the property of the debtor's estate. A claim for restitution necessarily follows from the alleged harm to the debtor. Accordingly, the bankruptcy court's decision to remand Behr's claims for

a restitutionary award is REVERSED and the claim is the property of the debtor's estate under section 351(a)(1). The bankruptcy court's holding remanding the claim for injunctive relief is AFFIRMED.

D

The city has appealed the bankruptcy court's determination that the city's state law conversion and unjust enrichment claims belong to the debtor, the utility, and so were properly removed.

Noting that the city's complaint alleged that the money converted was owned and held by the utility, the bankruptcy court concluded that the city lacked standing to assert that claim. *In re PG&E*, 281 BR at 14. The bankruptcy court concluded that, because the city's unjust enrichment claim was essentially indistinguishable from the conversion claim, that claim too was the property of the debtor, and so properly removed to the bankruptcy court. *Id* at 15.

State law claims can fall within the so-called "related to" jurisdiction of the bankruptcy court if they are "related to a case under title 11." 28 USC § 1334(c)(1). "[A] civil proceeding is 'related to' the bankruptcy if its outcome could conceivably have any effect on the bankruptcy estate. The proceeding need not be against the debtor or the debtor's property. It is sufficient if the 'outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of that bankruptcy estate." *In re ACI-HDT Supply Co*, 205 BR 231, 237 (9th Cir BAP 1997). Among the factors to which the court may look in making this determination are whether the debtor is a named defendant in the related action or whether the plaintiffs in the related action "are attempting to usurp causes of action that a trustee would have." *Id.*

As the bankruptcy court noted, one of the elements of a conversion claim is that the plaintiff owned or had a right to possess the property converted at the time of the conversion. *In re PG&E*, 281 BR at 14; *see Farmers Ins Exchange v Zerin*, 61 Cal Rptr 2d 707, 709 (Cal App 1997). The allegations of the city's complaint are that the money converted was owned and possessed by the utility. A conversion claim involving money owned and possessed by the debtor is the property of the bankruptcy estate. *See* 11 USC § 541; *In re Homer*, 45 BR 15, 25 (Bankr Mo 1984). The assessment of the city's unjust enrichment claim is analogous. The bankruptcy court correctly assessed the city's conversion and unjust enrichment claims as attempts to usurp causes of action properly the property of the debtor. As such, those causes of action were properly removed and the bankruptcy court had jurisdiction (and an obligation) to retain those causes of action.

The city also challenges the bankruptcy court's decision not equitably to remand its conversion and unjust enrichment claims. As discussed above, the decision whether equitably to remand a claim or cause of action is committed to the discretion of the bankruptcy court. Based on the bankruptcy court's proper assessment that the causes of action asserted by the city for conversion and unjust enrichment belong to the utility, the city has cited no basis for concluding that the bankruptcy court abused its broad discretion by failing to exercise that broad discretion in this instance.

For these reasons, the bankruptcy court's determination that the city's conversion and unjust enrichment causes of action were properly removed to the bankruptcy court by the corporation is AFFIRMED.

III

As described above, the court finds that only the civil penalty and injunctive relief claims must be remanded to state court under 28 USC § 1452(a); the restitution award claims are to be heard by the bankruptcy court. The court now considers whether retention of federal jurisdiction over the restitution award claims is sufficient to allow supplemental jurisdiction over the civil penalty and injunctive relief claims. Because the bankruptcy court remanded all of the claims filed by the AG, the City and Behr, it did not have occasion to consider this question.

The court finds that it would be improper to exercise supplemental jurisdiction over the civil penalty and injunctive relief claims. Bankruptcy jurisdiction includes jurisdiction over civil proceedings based on state law that are "related to" a bankruptcy proceeding. 28 USC § 1334(b). The court has similar discretion "whether to retain a related case" as its discretion whether to retain pendant or supplemental cases. *See In re Carraher*, 971 F2d 327, 328 (9th Cir 1992) (holding that discretion whether to retain a related case after the bankruptcy case is dismissed is analyzed in the same way as the discretion whether to retain pendent state claims after the federal claim has been dismissed).

In this case, however, the court does not have discretion to retain the civil penalty and injunctive relief claims because those claims are not removable in the first instance. As an initial matter, the court notes that section 1452(a) requires removal analysis to be conducted on a claim-by-claim basis. *See* 28 USC § 1452 (a) ("A party may remove any *claim or cause of action in a civil action* * * * .") (emphasis added). Under section 1452 (a), a claim or cause of action brought by a governmental unit with the intent to exercise its police or regulatory power cannot be removed to federal court. *Id* ("A party may remove any

claim or cause of action in a civil action other than * * * a civil action by a governmental unit to enforce such governmental unit's police or regulatory power * * *."); *In re Friedman & Shapiro*, 185 BR at 145 (finding that the police or regulatory power exception to section 1452(a) means that removal of a claim covered by the exception is "completely improper" and that the exception "specifically and purposefully deprive[s]" the federal court of jurisdiction).

A court cannot retain jurisdiction over a claim if the court has never had jurisdiction over the claim in the first place. Because claims that fall under an exception to section 1452(a) may not be removed, the ostensible removal of such claims under section 1452(a) does not itself create jurisdiction to retain the state claims. Section 1452(a) grants the court jurisdiction to determine whether the claims were properly removed. If the court finds that the claims were removable, then the court may exercise "related to" jurisdiction. If, however, the court finds that the claims were not removable, then the court has no power to exercise "related to" jurisdiction.

In this case, the court finds that the civil penalty and injunctive relief claims fall under the police or regulatory power exception to section 1452 (a). Accordingly, the court finds that it cannot exercise "related to" jurisdiction over the claims.

Even were the court to find that it had power to retain jurisdiction over the civil penalty and injunctive relief claims, the court would not retain the claims. Civil penalties, if awarded, would be paid by the corporation to state and local entities. *See* Cal Bus & Prof Code § 17206(c) (allocating the distribution of civil penalties between state and local entities). The utility's estate would not be augmented or diminished by the payment of civil penalties in the way that the restitutionary claims would affect the bankrupt estate. Accordingly, the exercise of supplemental

jurisdiction over the civil penalty and injunctive relief claims would not be appropriate.

IV

For the reasons set forth above, the bankruptcy court's remand of the AG's and the city's civil penalty and injunction claims is AFFIRMED pursuant to section 1452(a). The bankruptcy court's order removing and refusing to stay the restitutionary award claim is REVERSED. The court also finds that under section 541(a)(1), the restitutionary claims of the AG and the city are the property of the estate. The bankruptcy court's decision to remand Behr's claims for a restitutionary award is REVERSED. Behr's restitutionary claim is the property of the debtor's estate under section 351(a)(1). The bankruptcy court's holding remanding the claim for injunctive relief is AFFIRMED.
The clerk is DIRECTED to close the file and TERMINATE all pending motions.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re	Bankruptcy Case No. 01-30923DM
PACIFIC GAS & ELECTRIC COMPANY,	
Debtor.	Chapter 11
PEOPLE OF THE STATE OF CALIFORNIA, ET AL. Plaintiffs,	Adversary Proceeding No. 02-3026DM
v.	
PG&E CORPORATION; ET AL., Defendants.	
CITY AND COUNTY OF SAN FRANCISCO, ET AL., Plaintiffs,	Adversary Proceeding No. 02-3040DM
v.	
PG&E CORPORATION, ET AL., Defendants.	
CYNTHIA BEHR, Plaintiff,	Adversary Proceeding No. 02-3042DM
v.	
PG&E CORPORATION, ET AL., Defendants.	Consolidated For Motions To Remand and Motions to Dismiss

MEMORANDUM DECISION ON MOTIONS TO REMAND

I. INTRODUCTION

On April 23, 2002, the court heard arguments on three motions to remand to the state court three complaints filed against PG&E Corporation ("Corporation")[1], and in two instances, against several individuals who are directors of Corporation or of debtor, Pacific Gas and Electric Company ("Debtor"). After considering the motions, the oppositions, including Debtor's Position Regarding Motions To Remand and The Automatic Stay, and the arguments of counsel, the court will remand portions of all three removed actions, for the reasons set forth below.

II. FACTS AND PROCEDURAL HISTORY[2]

On January 10, 2002, Bill Lockyer, Attorney General of the State of California (the "AG"), filed a Complaint For Restitution, Civil Penalties, Injunction, Appointment Of Receiver, And Other Equitable And Ancillary Relief (the "AG Complaint") in the Superior Court of the State of California for the County of San Francisco (*People of the State of California, ex rel. Bill Lockyer, Attorney General of the State of California v. PG&E Corporation, et al.*; Case No. CGC-02-403289; Adversary Proceeding No. 02-3026) (the "AG Action"). On February 2, 2002, Corporation removed the AG Action to this court by filing its Notice of Removal Of Action.

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[1] Corporation is not a debtor in this court; rather, Corporation is the parent corporation of the debtor.

[2] For purposes of the court's consideration of the three motions to remand, all of the allegations of all three complaints are deemed to be true.

On February 11, 2002, the City and County of San Francisco ("CCSF") and the People of the State of California, by and through San Francisco City Attorney Dennis J. Herrera, filed a Complaint For Restitution, Civil Penalties, Injunction, Appointment Of Receiver, And Other Ancillary Relief (Conversion; Unjust Enrichment; Cal. Bus. & Prof. Code § 17200 - Unlawful, Unfair & Fraudulent Business Practices) in the Superior Court of the State of California for the County of San Francisco (the "CCSF Complaint") (*City and County of San Francisco; People of the State of California v. PG&E Corporation; Does 1-150*; Case No. CGC-02-404453; Adversary Proceeding No. 02-3040) (the "CCSF Action"). On March 4, 2002, Corporation removed the CCSF Action to this court by filing its Notice of Removal Of Action.

On February 14, 2002, Cynthia Behr ("Behr") filed a Complaint For Recovery Of Claim, Set Aside Fraudulent Transfer, Conspiracy, Attachment, And/Or Levy Executed Against Assets, Damages, Restitution, Injunction, Appointment Of Receiver, And Other And Equitable And Ancillary Relief (Cal. Bus. & Prof. Code §17200 - Unlawful, Unfair & Fraudulent Business Practices; Cal. Civ. Code § 3439 - Uniform Fraudulent Transfer Act; Cal. Comm. Code § 6107 - Sales Act) (the "Behr Complaint") in the Superior Court of the State of California in and for the County of Santa Clara (*Cynthia Behr v. PG&E Corporation, et al.*; Case No. CV-805274; Adversary Proceeding No. 02-3042) (the "Behr Action"). On March 8, 2002, Corporation removed the Behr Action to this court by filing its Notice Of Removal of Action.[3]

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[3] Corporation should have removed the Behr Action to the San Jose Division of this court. Fed. R. Bankr. P. 9027(a)(1). It is highly likely that removal to that division would have resulted in an intra-district transfer to this division. In any event, Behr did not object to the removal directly to this division and the court thus considers the issue waived.

Despite its lengthy title, the AG Complaint purports to assert one cause of action, viz. violation of the Unfair Competition Act, section 17200 of the California Business and Professions Code ("Section"). For the most part the AG Complaint alleges numerous events that occurred prior to April 6, 2001 (the "Petition Date"), the date the Debtor commenced its present Chapter 11 case in this court. Reducing a complex history and dozens of allegations to the simplest, the thrust of the Section 17200 theory is that Corporation has engaged in a series of events amounting to unlawful, unfair and fraudulent business acts or practices including (1) agreeing to the so-called First Priority Condition[4] while never intending to abide by it and other conditions; (2) subordinating the interests of Debtor and Debtor's ratepayers to Corporation's own interest; (3) failing to disclose to the California Public Utilities Commission (the "CPUC") its true intentions during the so-called Holding Company Proceedings;[5] (4) transferring ratepayer-funded assets from Debtor to Corporation for the benefit of Corporation and its affiliates, even while Debtor was experiencing financial distress, and without intent to infuse capital into Debtor when it needed capital to operate, in violation of the First Priority Condition and other conditions; (5) appropriating over $4 billion from revenues that Debtor had received from high frozen rates paid by ratepayers; (6) implementing "ring-fencing" transactions to protect the

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[4] The AG alleges that in order to obtain CPUC's approval of Debtor's application to reorganize into a holding company structure (*see* footnote 5 below), Corporation and its directors agreed that they would give "first priority" to the capital needs of Debtor as determined to be necessary and prudent to meet its obligations to serve or operate Debtor in a prudent and efficient manner. AG Complaint at ¶44(g).

[5] On October 20, 1995, Debtor filed an application with the CPUC for approval to reorganize under a holding company structure. It proposed to implement the restructuring through a reverse triangular merger. As a result of the merger, Debtor would become the wholly owned subsidiary of Corporation. AG Complaint at ¶37.

assets of other affiliates of Corporation from bankruptcy or credit down-grading, insuring that it would be impossible for Debtor to access such excess and impairing Corporation's ability to provide cash to Debtor, again in violation of the First Priority Condition. While the allegations go beyond those summarized by the court, for convenience they will be referred to herein as the "First Priority Claims."

The AG Complaint also alleges some events that occurred after the Petition Date. It alleges that Corporation is co-proponent of a Plan of Reorganization (the "Plan") in this court whereby Debtor will transfer assets of its electricity transmission business, its gas transmission business and its electricity generation business to entities outside of the control of the CPUC. It charges Corporation with utilizing the Plan (1) to restructure Debtor's operations without CPUC approval; (2) to remove those current operations and activities from the CPUC's jurisdiction; (3) to transfer hydro-electric generation assets for an amount far below their fair market value, without any revenue sharing mechanism which would entitle ratepayers to any credit for profits realized in violation of California law; (4) to burden Debtor with many of the liabilities with which it entered bankruptcy; (5) to change the ownership structure of Debtor without CPUC approval; (6) to evade compliance with the CPUC's Affiliates Rules;[6] (7) to prohibit CPUC and the State of California from taking action related to the allocation or other treatment of "gain on sale" related to assets transferred or disposed under the Plan, and (8) to prohibit Debtor from reassuming the "net open position" of its customers unless certain conditions are met. More specifically, the AG Complaint alleges that Corporation's use of Debtor's Chapter 11 bankruptcy to approve restructuring transactions and transfer assets is "unfair" (AG

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[6] In Decision D-97-12-088, the CPUC adopted affiliate transaction rules governing the relationship between California's energy utilities and their affiliates. AG Complaint at ¶ 46.

Complaint, ¶ 105); that through Debtor's Chapter 11 bankruptcy case, Corporation and the other individual defendants are "... continuing to engage in unlawful, unfair and fraudulent business practices ..." (AG Complaint, ¶ 113); and that "[Corporation's and the individual defendants'] continuing wrongful conduct ... will further cause great and irreparable harm to ratepayers." (AG Complaint, ¶ 115.) While the allegations go beyond those summarized by the court, for convenience they will be referred to herein as the "Plan Claims."

The CCSF Complaint sets forth three separate causes of action. The first alleges conversion, the second alleges unjust enrichment, and the third alleges violation of Section 17200. The factual allegations are similar to, but nowhere near as comprehensive as, those in the AG Complaint. For purposes of this Memorandum Decision, CCSF's Section 17200 claims are also identified as "First Priority Claims." They do not allege any events after the Petition Date.

The conversion claim is somewhat confusing. CCSF alleges that "Corporation took at least $5.2 billion *from [Debtor]* between 1997 and 2000" and that, as a result, Debtor requested and was granted rate increases to cover shortfalls. CCSF Complaint, ¶ 43 (emphasis added). The CCSF Complaint thus concedes that the purportedly converted funds were owned and possessed by Debtor at the time of the alleged conversions. The CCSF Complaint does not allege that CCSF, citizens of San Francisco or of California, or Debtor's ratepayers (as opposed to Debtor) owned or had an immediate right of possession to the money at the time of the alleged conversion.

The unjust enrichment claim of CCSF also alleges that Corporation unlawfully took money from Debtor, leaving it with insufficient money to provide safe and reliable electric service. This resulted in CCSF and ratepayers being forced to advance additional money to Debtor in the form of rate increases. In order to avoid

Corporation's unjust enrichment, CCSF asks for the imposition of a constructive trust upon money wrongfully taken by Corporation. Regardless of the different drafting approach, this claim resembles the conversion claim. It does not allege anyone other than Debtor owned the allegedly wrongfully withdrawn money.

The Behr Complaint appears to be almost a verbatim duplication of the AG Complaint, although it states four causes of action: (1) a claim under Section 17200; (2) a claim under Cal. Civ. Code § 3439, the Uniform Fraudulent Transfer Act ("Fraudulent Transfer Claim"); (3) a claim of conspiracy; and (4) a claim under California Commercial Code § 6107, the California Bulk Sales Law ("Bulk Sales Claim"). As to the last three causes of action, no new facts have been pleaded. With respect to Behr's Section 17200 claims, those based on pre-petition conduct are also identified as "First Priority Claims" and those based on post-petition, Plan-related conduct are identified as "Plan Claims".

On March 1, 2002, the AG moved to remand the AG Action to Superior Court; in the alternative he moved for abstention. On March 22, 2002, CCSF made a similar motion; on April 1, 2002, Behr made a similar motion. Corporation opposed all three motions to remand and filed motions to dismiss the three complaints under Fed. R. Civ. P. 12(b)(6), or in the alternative, sought a stay of the respective actions until the Effective Date of Debtor's Plan. Rather than consider those motions to dismiss, the court directed the parties to respond to the motions to remand. The court deferred action on the motions to dismiss until resolution of the motions to remand.

III. ISSUES

A. Does sovereign immunity prevent the AG Action and the CCSF Action from being removed to the bankruptcy court?

B. Do the portions of the AG Action and the Behr Action raising the Plan Claims fall within the exclusive jurisdiction of the bankruptcy court?

C. Are the First Priority Claims asserted in the AG Action and the CCSF Action exempt from removal under 28 U.S.C. § 1452 (a) ("Section 1452 (a)")?

D. Should Behr's First priority Claims be equitably remanded under 28 U.S.C. § 1452(b) ("Section 1452(b)")?

E. May Behr prosecute her Fraudulent Transfer Claim and her Bulk Sales Claim in state court?

F. May CCSF prosecute its conversion claim in state court?

IV. DISCUSSION

A. Sovereign Immunity Is Inapplicable

Citing *People v. Steelcase, Inc.*, 792 F.Supp. 84, 86 (C.D. Cal. 1992), AG and CCSF argue that the Eleventh Amendment bars removal of the actions initiated by each of them. The court disagrees. *Steelcase* is inconsistent with the weight of authority, including that of the Supreme Court and the Northern District of California,[7] and has been rejected in

[7] *See Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (where state is plaintiff in suit involving federal rights, "those suits may be brought in or removed to the [federal] courts without regard to the character of the parties"), *citing Ames v. Kansas*, 111 U.S. 449, 470 (1884). *See also People v. Acme Fill Corp.*, 1997 WL 685254 (N.D. Cal.

many subsequent decisions from other courts. *See In re Rezulin Products Liability Litigation*, 133 F.Supp. 2d 272, 297 (S.D.N.Y. 2001) ("the heavy weight of authority holds that the Eleventh Amendment does not bar removal"); *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F.Supp. 2d 1036, 1039 (D. Minn. 1999) (same, citing numerous cases).[8] This court believes that the reasoning of the majority of the cases is more persuasive, and concludes that the Eleventh Amendment does not preclude removal of the AG action or the CCSF Action to the bankruptcy court.

B. Plan Claims are Preempted and Removable

In their respective complaints, AG and Behr allege that Corporation has manipulated the bankruptcy process in a manner constituting "unlawful, unfair and fraudulent business practices." These allegations, which this court has identified as the "Plan Claims," cannot be heard by the state court and thus will not be remanded.

The Bankruptcy Code preempts virtually all claims relating to alleged misconduct in the bankruptcy courts. *See Holloway v. Household Auto. Fin. Corp.*, 227 B.R. 501, 507 (N.D. Ill. 1998) (finding claim under Illinois Consumer Fraud and Deceptive Practices Act preempted by Bankruptcy Code), *citing MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74

1997) (Walker, J.) (("California brought suit against Acme of its own accord to recover civil penalties. As a plaintiff, it cannot now assert immunity from suit under the Eleventh Amendment."); *cf. Lapides v. Board of Regents of the Univ. System of Ga.*, ____ U.S.____, 122 S.Ct. 1640 (2002) (state's removal of suit to federal court constituted waiver of its Eleventh Amendment immunity).

[8] In criticizing the *Steelcase* decision, the Regents court stated: "It is noteworthy that the court in *Steelcase* did not cite any authority for this proposition, nor did it attempt to distinguish the other cases, cited above, which found the Eleventh Amendment was not a bar to removal of a state court action in which a state was the plaintiff." 58 F.Supp.2d at 1040.

F. 3d 910 (9th Cir. 1996) (finding claim for malicious prosecution was preempted by Bankruptcy Code).[9] "The Bankruptcy Code provides a comprehensive scheme reflecting a 'balance, completeness and structural integrity that suggests remedial exclusivity.'" *Shape, Inc.*, 135 B.R at 708, *quoting Periera*, 92 B.R. at 908. "Since this federal statute is applicable here, and has its own enforcement scheme and separate adjudicative framework, it must supercede any state law remedies." *Shape, Inc.*, 135 B.R. at 708.[10]

The Ninth Circuit recognized this proposition in *MSR Exploration*, where it observed:

> [A] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code ...demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all the rights and duties of creditors and embarrassed debtors alike. While it is true that bankruptcy law makes reference to state law at many points,

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[9] *See also Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987) (malicious prosecution claim preempted by the Bankruptcy Code); *Pereira v. First N. Am. Nat'l Bank*, 223 B.R. 28 (N.D. Ga. 1998) (finding state law claims for an accounting and unjust enrichment preempted by Bankruptcy Code); *Brandt v. Swisstronics, Inc. (In re Shape, Inc.)*, 135 B.R. 707, 708 (Bankr. D. Me. 1992) (Bankruptcy Code preempts Massachusetts Consumer Protection Act with respect to conduct arising out of or relating to the bankruptcy case).

[10] In *Shape, Inc.*, the debtor sued a creditor alleging that various violations of the automatic stay constituted an unfair and deceptive business practice. *Id.* The court noted that the Bankruptcy Code contains the remedy for such violations and thus "supercede[d]" the state law. Here, as in *Shape, Inc.*, remedies are provided under the Bankruptcy Code to any party who successfully contests the ability of a debtor to reorganize or the good faith of a plan proponent, including denial of confirmation. *See* 11 U.S.C. §§ 1112(b) and 1129(a). Such remedies should be pursued exclusively in this court.

> *the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal.*

MSR Exploration, 74 F. 3d at 913-14 (emphasis added) (noting that preemption with respect to state law remedies for bankruptcy activities must be applied broadly; otherwise "the opportunities for asserting malicious prosecution claims would only be limited by the fertility of the pleader's mind and by the laws of the state in which the proceeding took place.") (citations omitted).

AG and Behr have cited no reported decision in which a creditor, government agency, or other party has attempted, by resort to state court, to enjoin (or extract restitution or damages from) a plan proponent for prosecuting a plan of reorganization or any aspect thereof. Rather, courts (including the Ninth Circuit) have held that similar collateral attacks on bankruptcy proceedings and the bankruptcy process should not be heard by state courts. For example, in *Gonzales*, the debtor (Gonzales) defaulted on an obligation prior to commencing his chapter 11 case. *See Gonzales*, 830 F. 2d at 1033. A creditor (Parks) sought to foreclose a deed of trust she held on a house owned by Gonzales. *Id.* Shortly before the scheduled state law trustee sale, Gonzales filed a bankruptcy petition and the trustee halted the sale. *Id.* Parks subsequently filed a statutory tort action against Gonzales in California state court, claiming that the bankruptcy filing constituted an abuse of process. *Id.* at 1033-34. Gonzales did not answer the complaint, and the state court entered a default judgment against him. *Id.* at 1034.

Gonzales later filed an adversary proceeding in the bankruptcy court against Parks, seeking relief from the state court judgment. *Id.* The bankruptcy court granted Gonzales' motion for summary judgment, declaring the state court judgment void at its inception as violating the automatic

stay. *Id.* The bankruptcy court then vacated the state court judgment. *Id.* The district court affirmed. *Id.*

On appeal to the Ninth Circuit, the court agreed with Parks that the filing of the abuse of process claim did not necessarily violate the automatic stay, as the automatic stay is "primarily intended to apply to claims based on prior [i.e., prepetition] debts and obligations [,]" and is "not applicable to debts or obligations that accrue after the filing of the bankruptcy petition." *See Id.* at 1035. The court then noted that "the effect the [automatic stay] would have on a theoretical third category of debts and obligations, those that might accrue at the moment of the filing or by virtue of the filing, is far from clear - and that is the category involved in the case before us." *Id.*

Instead, the Ninth Circuit affirmed the bankruptcy court's decision on other grounds: that is, state courts are without subject matter jurisdiction to hear a claim that the filing of a bankruptcy petition constitutes an abuse of process. *See Id.*

In reaching its conclusion, the Ninth Circuit found:

> Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating. The ability collaterally to attack bankruptcy petitions in the state courts would also threaten the

> uniformity of federal bankruptcy law, a uniformity required by the Constitution.
>
> * * *
>
> That Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to a requirement of good faith, and violations of that requirement can result in the imposition of sanctions. Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties . . . In any event, *it is for Congress and the federal courts, not the state courts, to decide which incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized.*

Id. at 1035-36 (emphasis added) (citations omitted).[11]

Of particular significance in *Gonzales* is the Ninth Circuit's refusal to rely upon the automatic stay provisions of

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[11] *Cf. State Street Bank & Trust Co. v. Park (In re Si Yeon Park, Ltd.)*, 198 B.R. 956, 962 (Bankr. C.D. Cal. 1996) (bankruptcy trustee cannot be required to obtain permission from a state court to file a bankruptcy adversary proceeding; giving state courts veto power over federal actions would violate federal supremacy and interfere with the administration of bankruptcy cases. "Moreover, the bankruptcy court has exclusive jurisdiction to determine whether a case or adversary proceeding has been improperly filed in the bankruptcy court. The exercise of that jurisdiction is particularly important when the matter involves fundamental questions of bankruptcy law[.]").

the Bankruptcy Code in reaching its holding. Instead, the court looked to the jurisdictional provisions of the Bankruptcy Code and held that state courts simply are without power to act in connection with those matters exclusively within the purview of bankruptcy court jurisdiction. For the same reason the *Gonzales* court also kept within the bankruptcy court the action against Gonzales' attorney, who was not in bankruptcy.

Gonzales is analogous to the instant case.[12] Like the filing of a bankruptcy petition generally, matters concerning confirmation of a plan of reorganization in a chapter 11 case go to the very essence of a bankruptcy court's "original and exclusive jurisdiction of all cases under title 11" (*see* 28 U.S.C. § 1334(a)), and, as a core proceeding under 28 U.S.C. § 157(b)(2)(L), plan confirmation is within the protected sphere of matters that the Ninth Circuit has held to be free from second-guessing by state courts. *See Gruntz v. County of Los Angeles (In re Gruntz),* 202 F. 3d 1074, 1083 (9th Cir. 2000) ("[E]ven assuming that the states had concurrent jurisdiction, their judgment would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings. . . . The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land.") (cites and internal quotation marks omitted).[13] Other courts, both state and

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[12] Just as a creditor cannot prosecute an abuse of process claim in state court against a bankruptcy debtor and his attorney for seeking protection of the bankruptcy court, a creditor similarly cannot sue a plan proponent in state court upon an allegation of abusive use of the bankruptcy laws.

[13] *See also Contractors' State License Board v. Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001) (to extent licensing board erred in concluding that proceedings before it came within "police or regulatory power" exception to the automatic stay in licensee's chapter 13 case, such administrative proceedings were void *ab initio*, and bankruptcy court was under no obligation to extend full faith and credit to board's determination).

federal, have reached the same conclusion. *See, e.g., Saks v. Parilla, Hubbard & Militzok*, 67 Cal. App. 4th 567, 573-74 (1998) ("Parties may not avail themselves of state court tort remedies to circumvent federal remedies for their opponents' alleged misuse of the bankruptcy process."); *Idell v. Goodman*, 224 Cal. App. 3d 262, 271 (1990) (finding that sanctions contained in Bankruptcy Code preempted state action based on allegations that creditor filed adversary proceeding in bad faith); *Gene R. Smith Corp. v. Terry's Tractor, Inc.*, 209 Cal. App. 3d 951, 954 (1989) (holding that specific remedial provisions in Bankruptcy Code preempted debtor's state action for abuse of process and malicious prosecution based on creditors' allegedly malicious filing of involuntary bankruptcy petition); *see also Gonzales*, 830 F.2d at 1036 ("A Congressional grant of exclusive jurisdiction to federal courts includes the implied power to protect that grant . . . A state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts.") (citations omitted). Because the true gravamen of the Plan Claims are federal bankruptcy issues, these claims are preempted and shall not be remanded. [14]

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[14] AG and CCSF contend that their respective actions must be remanded because Section 1452(a) prohibits removal of "civil actions by a governmental unit to enforce such governmental unit's police or regulatory powers." As discussed later in this memorandum decision, the First Priority Claims do constitute claims for enforcement of the police and regulatory powers of the AG and CCSF and are thus not removable. The Plan Claims asserted by AG, on the other hand, are not police or regulatory claims and are therefore subject to remand.

A police or regulatory action arises when a governmental body enforces a statute, law or regulation which is effective whether or not a bankruptcy exists and which is not preempted by bankruptcy law. If, however, a governmental body is attempting to claim that the bankruptcy process has been abused, such a claim falls within the exclusive jurisdiction of the bankruptcy court. Such claims relating to the plan or the plan process are not subject to a state's police or regulatory power, but instead fall within the bankruptcy court's authority to regulate activities occurring in the context of a case pending before it. The AG's

C. First Priority Claims Are Not Removable

Section 1452(a) provides that a "party may remove any claim or cause of action in a civil action, *other than* a proceeding before the United States Tax Court or *a civil action by a governmental unit to enforce such governmental unit's police or regulatory power* . . ." 28 U.S.C. § 1452(a) (emphasis added). For the reasons stated below, the court concludes that the First Priority Claims asserted by AG and CCSF constitute "police and regulatory power" claims which are non-removable under Section 1452(a) and which are not exclusively "property of the estate."

AG and CCSF assert their First Priority Claims pursuant to Section 17200. The California Supreme Court has determined that an action for civil penalties and an injunction brought by a governmental agency under Section 17200 "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *People v. Pacific Land Research Co.*, 20 Cal. 3d 10, 17, 141 Cal.Rptr. 20, 24 (1977); *see also Massachusetts v. First Alliance Mortg. Co. (In re First Alliance Mortg. Co.)*, 263 B.R. 99, 108 (9th Cir. BAP 2001) ("it is well-established that consumer protection is a valid exercise of the police and regulatory power . . ."). Therefore, the portions of the AG Action and the CCSF Action[15] asserting First Priority Claims[16] are "police or regulatory power" actions and cannot be removed. 28 U.S.C. § 1452(a).

Plan Claims are such claims and, consequently, Section 1452(a) does not protect them from removal.

[15] Behr's First Priority Claims are not subject to the removal exception of Section 1452(a) since Behr is not a "governmental unit". Nevertheless, as discussed in Section IV(D), those particular claims should be equitably remanded.

[16] As discussed previously at footnote 14, the Plan Claims are *not* claims seeking to enforce the police or regulatory powers of the AG and CCSF, since conduct occurring in the context of proposing and

Corporation asserts that the AG Action and the CCSF Action are not police power actions because they would not satisfy the "pecuniary purpose" and "public policy" tests established to determine if an action is exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). Section 362(b)(4) is inapplicable to the issues before it. The court is not dealing with questions about exceptions to the automatic found in 11 U.S.C. § 352(b)(4). Rather, it must construe provisions in Section 1452 which describe what actions may not be removed. The pertinent language of the two sections is nearly identical, but the cases considering the pecuniary purpose and public policy issues have focused on whether as a matter of policy there should or should not be an exception to the automatic stay. Where the government acts like a creditor, it is stayed just like other creditors. When it is enforcing law, dealing with regulatory and law enforcement matters, the automatic stay does not stand in the way. But whether the automatic stay does or does not apply has little to do with whether actions -- stayed or not -- may be removed to the bankruptcy court. Nothing suggests that automatic stay considerations should inform the court's decision under Section 1452.[17]

Corporation also contends that 28 U.S.C. § 1441 ("Section 1441") -- a statute governing removals generally

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confirming a plan of reorganization is not subject to a state's regulatory power.

[17] In any event, as noted previously, the California Supreme Court has determined that a governmental unit's action to enforce Section 17200 does serve public policy. Moreover, in *United States v. Klein (In re Chapman)*, 264 B.R. 565, 571 (9th Cir. BAP 2001), BAP noted that -- under the 1998 revisions to 11 U.S.C. § 362 -- a governmental action to obtain a money judgment is not stayed, but that any action to enforce the money judgment is. In light of the 1998 revisions, the "pecuniary interest" test may have lost some of its relevance. Nonetheless, to the extent AG and CCSF seek to punish Corporation for purported violations and to deter similar conduct in the future, their actions satisfy the "pecuniary interest" test. *Id.* at 570; *First Alliance*, 263 B.R. at 108-09.

without a police or regulatory power exception -- is available as an alternative means to remove the AG Action and the CCSF Action to the bankruptcy court, citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). The court disagrees for several reasons.

First, and most importantly, Section 1441 states that "[e]xcept as otherwise expressly provided by Act of Congress," any civil action over which federal district courts have original jurisdiction may be removed to federal district court. Section 1452(a) "otherwise expressly provide[s]" that state police power actions related to a bankruptcy case are not removable. Under the express exception of Section 1441, then, the first Priority Claims are not removable.

Second, Section 1452 is more specific than the general provisions of Section 1441. As such, Section 1452 takes precedence over Section 1441. *Neary v. Padilla (In re Padilla),* 222 F. 3d 1184, 1192 (9th Cir. 2000) ("Statutory construction canons require that '[w]here both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of the enactment, and must be applied first.'"). Third, *Things Remembered* is distinguishable because it does not address the specific provision of Section 1452(a) excepting police power actions from removal; rather, it deals with the applicability of a statute limiting appellate review to remand orders made in suits removed under Section 1452 and Section 1441.

Corporation also contends that the First Priority Claims are removable because only Debtor has standing to prosecute such claims. The court disagrees. The First Priority Claims fall within the ambit of Section 17200. Under the express terms of Cal. Bus & Prof. Code § 17204, civil actions to enforce the Unfair Business Practices Act (e.g., Section 17200) may be brought by "any person acting for the interests of itself, its members, or the general public"). Therefore, the Section 17200 claims do not belong

exclusively to Debtor or its creditors, and may be remanded.[18]

Corporation further asserts that this court should retain the First Priority Claims because they are related to the bankruptcy case and because the court has supplemental jurisdiction over them under 28 U.S.C. § 1367 and 1441(c). The court dismisses Corporation's "related to" jurisdiction arguments as irrelevant. Assuming *arguendo* that the First Priority Claims are related to the bankruptcy case (however tangentially, inasmuch as Debtor is not asserting the claims and the claims are not being asserted against Debtor), such claims cannot be removed here under Section 1452 (a).[19] Congress did not create an exception (for related matters) to the exception to the bankruptcy removal statute discussed, supra.

In addition, the court will not exercise supplemental jurisdiction over the First Priority Claims even though it is retaining jurisdiction over the Plan Claims and (as discussed below) over CCSF's conversion and unjust enrichment claims and Behr's Fraudulent Transfer Claim and Bulk Sales Claim. Pursuant to 28 U.S.C. § 1367 ("Section 1367"), in any civil action where a district has original jurisdiction, "except . . . as expressly provided by Federal statute" the district court "shall have supplemental jurisdiction over all other claims *that are so related to claims* in the action within such original jurisdiction *that they form part of the same case or controversy* . . . "28 U.S.C. § 1367(a). Section 1367(c) notes, however, that the court may decline to

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[18] This court expresses no opinion whether Debtor could prosecute a Section 17200 action against Corporation or its officers and directors.

[19] If AG had brought these claims here initially, the court may have had "related to" jurisdiction to the extent any funds recovered by AG would flow to the estate. AG brought the First Priority Claims in state court and to the extent they are "police power" claims, they simply cannot be removed to this court.

exercise supplemental jurisdiction over a claim if "the claim substantially predominates over the claim" over which the court has original jurisdiction or if "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(2) and (4).

In this case, supplemental jurisdiction is not required under Section 1367(a) because Section 1452(a) "expressly provide[s] otherwise" by preventing removal of the First Priority Claims. *See Estate of Tabas*, 879 F.Supp. 464, 467 (E.D. Penn. 1995) (Section 1367 "does not allow a party to remove an otherwise unremovable action to federal court for consolidation with a related federal claim"). In addition, Section 1367(a) is inapplicable because the Plan Claims and the First Priority Claims do not form the same case or controversy; they do not arise from a common factual nucleus. Instead, they are claims based on distinct and easily divisible pre-petition and post-petition conduct.

Nonetheless, even if Section 1367(a) were applicable, the court would decline to exercise jurisdiction because the First Priority Claims predominate over the Plan Claims in the AG Complaint and the Behr Complaint.[20] More importantly, another compelling reason exists for this court to decline supplemental jurisdiction: the First Priority Claims constitute non-removable police power claims and Section 1367 should not be used to bootstrap nonremovable claims to related federal claims. *Tabas*, 879 F.Supp. at 467.

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[20] In the Behr Action the First Priority Claims also predominate over the Fraudulent Transfer Claim and Bulk Sales Claim (which, as discussed later, Behr does not have standing to prosecute). The First Priority Claims also predominate over CCSF's conversion and unjust enrichment claims.

D. Behr's Section 17200 Claims Should Be Remanded Under 28 U.S.C. Section 1452(a)

As a private citizen, Behr cannot assert the "police power" exception to removal available to "governmental units" under Section 1452(a). Nonetheless, her "First Priority Claims" asserted under Section 17200 are virtually identical to the Section 17200 First Priority Claims of AG and CCSF. The latter claims, which involve identical factual issues and similar legal issues as Behr's First Priority Claims, are being remanded under Section 1452(a). Therefore, under the doctrine of equitable remand set forth in Section 1452(b), grounds exist to remand Behr's First Priority Claims. Such a remand avoids similar litigation in multiple fora[21] and promotes the goals of judicial efficiency.

E. Behr's Fraudulent Transfer Claim And Bulk Sales Claim Belong To Estate And Should Not Be Remanded

Because (as discussed below), Behr lacks standing to assert her Fraudulent Transfer Claim and her Bulk Sales Claim, those particular claims should not be remanded. Such claims belong to the estate of Debtor and fall within this court's core jurisdiction.

Absent court approval, only a trustee or debtor in possession has standing to assert a fraudulent transfer action. *American National Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.),* 714 F.2d 1266 (5th Cir. 1983) (creditor's cause of action under the Texas Fraudulent Transfers Act passed to trustee, who is charged

[21] Behr's First Priority Claims will be remanded back to the Superior Court of the County of Santa Clara, while the First Priority Claims of AG and CCSF will be remanded back to the Superior Court of the County of San Francisco. Upon remand, to facilitate the interests of judicial economy, consolidation of these actions appears appropriate but that is for the state courts to consider.

with prosecuting on behalf of all creditors and shareholders); *AP Industries, Inc. v. SN Phelps & Co. (In re AP Industries, Inc.),* 117 B.R. 789, 800 (Bankr. S.D.N.Y. 1990) (holding that initiation of state law fraudulent transfer action violated the automatic stay; court sanctioned creditor) ("intercession of a bankruptcy petition vests standing in a trustee or debtor-in-possession to prosecute an action for recovery of a fraudulent conveyance . . . 'It is axiomatic that a duly qualified trustee in bankruptcy represents the estate and is the only proper party to maintain any action under Code § 544(b) . . . and that the creditors of the estate have no right to proceed independently in their own names . . .'").

The Fifth Circuit explained why a trustee or debtor-in-possession has the sole standing to pursue fraudulent transfer actions:

> The "strong arm" provision of the current Code, 11 U.S.C. § 544, allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment. [Citation omitted.] A trustee acting under section 544 "acts as a representative of creditors," [citation omitted] and any property recovered is returned to "the estate for the eventual benefit of all creditors." [Citations omitted.] The Supreme Court has, in fact, expressly noted that section "541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," which would include property made available through section 544. [Citation omitted.] *Actions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws would interfere*

> *with this estate and with the equitable distribution scheme dependent upon it, and are therefore appropriately stayed under section 362(a)(3). Any other result would produce near anarchy where the only discernible organizing principle would be first-come-first-served. Even without the Bankruptcy Code and the policies that support it, we would be reluctant to elevate such a principle to a rule of law.*

MortgageAmerica, 714 F.2d at 1275-76 (emphasis added).

Similarly, the creditors of Debtor who had standing to prosecute claims under any bulk sales law prior to the petition date no longer enjoy such standing. *AP Industries*, 117 B.R. at 800 (bankruptcy vests power to prosecute such claims on trustee or debtor in possession; after bankruptcy, judgment creditor's "status, as a party with standing to void transfers as fraudulent conveyances or as defective bulk sales, was impaired by the superseding bankruptcy cases.") (citations and quotations omitted).

California Commercial Code Section 6107 entitles "claimants" to sue for violation of the Bulk Sales Law. The transferor (here Debtor, according to Behr) has no such right. *See* Cal. Comm. Code § 6107(a) and (b) and UCC Comment, ¶ 1. Under 11 U.S.C. § 544(b), the debtor in possession would have such a right in place of aggrieved creditors.

Since the estate is the only party with standing to assert the Fraudulent Transfer Claim and the Bulk Sales Claim, Behr cannot pursue these claims. By initiating such actions Behr violated the automatic stay. Moreover, since these claims belong to the estate, they fall within this court's core jurisdiction under 28 U.S.C. § 157(H) and (F). Consequently, the court will not remand these claims.

F. CCSF's Conversion And Unjust Enrichment Claims Belong To Estate And Should Not Be Remanded

As noted previously, CCSF's Complaint indicates that at the time of the purported conversions, the money being converted was owned and held by Debtor. As such, the claim of conversion belongs to Debtor's estate and CCSF lacks standing to assert it. *Kremen v. Cohen*, 99 F.Supp. 2d 1168, 1172 (N.D. Cal. 2000) (elements of conversion require plaintiff to have "ownership or right to possession of the property at the time of the conversion"); *Jenkins v. Homer (In re Homer),* 45 B.R. 15, 25 (debtors' claim for conversion became property of estate and assertable only by trustee). CCSF's unjust enrichment claim is too similar to be treated any differently. For the same reasons that Behr lacks standing to pursue her Fraudulent Transfer Claim and her Bulk Transfer Claim, CCSF lacks standing to pursue the conversion claim and the unjust enrichment claim, which belong to the estate. Therefore, those claims fall within this court's core jurisdiction and will not be remanded.

V. CONCLUSION

An order remanding the third cause of action of the CCSF Complaint is being issued concurrently with this Memorandum Decision.

In order to avoid confusion in both this court and in the state courts, no later than July 14, 2002, AG and Behr should file and serve amended complaints, either deleting their Plan Claims or separating the Plan Claims and the First Priority Claims into distinct causes of action.[22]

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[22] In other words, the AG's Plan Claims set forth in paragraphs 99-107 and 113-115 of the AG Complaint should either be deleted or be placed into a separate cause of action alleging post-petition events that purportedly violate Section 17200. Similarly, Behr's Plan Claims set

The court will hold a status conference on July 22, 2002, at 9:30 a.m. with respect to the non-remanded claims and Corporation's pending motions to dismiss. At that conference the court will set a briefing schedule for those motions; nothing pertaining to them should be filed earlier. The court will also discuss with counsel whether the Plan Claims should be consolidated with any objections to confirmation of the Plan to be filed by AG, CCSF or Behr.

At the same conference the court will determine whether the AG Complaint and the Behr Complaint have been properly amended consistent with this Memorandum Decision. If so, the court will then issue remand orders in the AG Action and the Behr Action. Counsel for Corporation should be prepared to comment on the amended complaints at the status conference.

Dated: June 14, 2002

Dennis Montali
United States Bankruptcy Judge

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forth in paragraph 121 of Behr's Complaint should either be deleted or be placed into a separate cause of action alleging post-petition events that purportedly violate Section 17200.

I, the undersigned, a regularly appointed and qualified clerk in the office of the Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of California, at San Francisco, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's Office, or by facsimile to the facsimile numbers listed below, at San Francisco, California, on the date shown below.

Dated: June ____, 2002

_____

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY & COUNTY OF SAN FRANCISCO, Plaintiff - Appellant v. PG&E CORPORATION, Defendant - Appellee.	No. 03-16976 D.C. No. CV-02-03668 -VRW Northern District of California, San Francisco **ORDER**
PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER, Attorney General State of California, Plaintiff - Appellant, v. PG&E CORPORATION, Defendant - Appellee.	No. 03-17051 D.C. Nos. CV-02-04330-VRW CV-02-03668-VRW CV-02-04071-VRW Northern District of California, San Francisco

Before: THOMAS, PAEZ, and CALLAHAN, Circuit Judges.

Judges Thomas and Paez have voted to reject the suggestion for rehearing en banc. Judge Callahan voted to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.
Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is REJECTED.